IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1897.

IN THE MATTER OF THE APPLICATION OF THE DE LA VERGNE REFRIGERATING MACHINE COMPANY FOR A WRIT OF CERTIORARI.

THE DE LA VERGNE REFRIGERATING MACHINE COMPANY,

Petitioner,

VS.

GERMAN SAVINGS INSTITUTION ET AL.,

Respondents.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF AND ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Statement of Facts.

This petition is addressed to this court at the suggestion of the two judges of the Circuit Court of Appeals who heard the cause and who differed upon the question of the power of The De La Vergne Refrigerating Machine Company to make the contract set out in the record. It was also suggested that the petition for the writ should be

promptly filed, so as to secure action by this court, if possible, before the expiration of the time within which a petition for a rehearing can be filed in the Court of Appeals.

The petition and record show that the several plaintiffs were stockholders in a manufacturing company known as the Consolidated Ice Machine Company, organized under the laws of the State of Illinois, and having its principal office at Chicago, which became insolvent and made an assignment, for the benefit of its creditors, of all its property of every nature and description to Robert E. Jenkins, as assignee, on October 14, 1891.

On April 16, 1891, The De La Vergne Refrigerating Machine Company, by its president and principal stockholder, John C. De La Vergne, made the contract set out in the petition and record. This was done without authority of the stockholders or directors of his company. There is no plea of *non est factum*, and, for the purpose of the question now addressed to the court, the contract must be deemed the contract of the corporation. The assets of the corporation were in the possession of the assignee under deed, and he has since disposed of them, including the good-will, to others. The Consolidated Ice Machine Company therefore transferred nothing to The De La Vergne Company or to Mr. De La Vergne by the contract of April 16, 1891. It had nothing to convey. The stockholders made a partial delivery of their shares of stock. The De La Vergne Company refused to carry out the contract, and the several shareholders brought separate actions at law in the Circuit Court of the City of St. Louis for the value of their several share holdings, basing their action upon the contract referred to. These actions were removed by the defendants, citizens of New York, to the Federal Court, there consolidated and tried

upon an agreed statement of facts, set out in the petition and record, resulting in a judgment for the defendants. A writ of error was taken to the Court of Appeals, and the judgment there reversed. (*German Savings Inst.* v. *De La Vergne Machine Co.*, 36 U. S. App., 184.)

The court, in its opinion, was very severe in its strictures upon the defendant company, assuming that it had received the assets of the Consolidated Ice Machine Com- and the good-will of its business, benefited by the suppression of the competition of that company, and obtained legal control of the suppressed corporation, and after obtaining the benefit of the contract had failed and refused to pay the agreed price therefor, on the technical ground that less than one-fourth of the stock of the corporation that had conveyed to it all of its assets and the good-will of its business had been imperfectly assigned. The court said that there was no evidence in the record that had any substantial merit, and it was exceedingly difficult to see how any failure to assign this small minority of the stock could result in any injury to the defendant, and proceeded:

> "After the conveyance and covenant of April 16, 1891, was executed and delivered, the corporation was nothing but an empty shell. All its valuable rights and property had been vested in the De La Vergne Company, and the legal control of the shell itself was given to De La Vergne by the valid assignment of a majority of the stock of the corporation. These defendants cannot retain these benefits and thus make $100,000 for themselves and throw a loss of $100,000 on the stockholders of this corporation, because they technically failed to perform their contract in the slight and immaterial particular that they did not legally assign a small minority of this stock." (36 U. S. App., 195.)
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> "Further, an offer to return them on September

12, 1891, if sufficient in form, would have been an idle ceremony. The defendants had undoubtedly then derived all the benefits of a performance of the contract by the Consolidated Company and its stockholders that they could ever derive. They still held the right to its assets, subject to its debts, the good-will of its business, and the covenant of its stockholders which suppressed its competition. No doubt, they had secured its customers and destroyed all possible competition. The return to the stockholders of the control over the empty shell of their corporation would have been a useless act. A merchant cannot, by offering to return the empty box, successfully defend an action for the purchase price of a box of goods, on the ground that the box was defective, when he has received and sold the goods." (36 U. S. App., 196.)

In interpreting this contract the court further said:

> "The rights and benefits which the defendants were to receive from this contract were, the right of the Consolidated Company to its assets, subject to the payment of its debts; the good-will of its business, which had been established for six years; the suppression of the competition of that company and its stockholders, and the legal control of the suppressed corporation . . . they received, retained, and had the benefit of all these rights and interests." (36 U. S. App., 194.)

When this decision was announced the appellants moved in the Court of Appeals that the order of reversal granting a new trial be modified, and that the reversal be with directions to enter judgment in favor of the several plaintiffs. This was refused, and the action stood for a new trial. Amended answers were filed. The sixth, seventh and eighth paragraphs of answer raised the issue distinctly that the contract was *ultra vires* of both the De La Vergne Refrigerating Machine Company and the Consolidated Ice Machine Company under the laws of their respective charter states. (R. 22–24.) Much testimony

was taken, the most of which has no bearing upon the particular question now presented to this court. It is sufficient to say that the inference of the Court of Appeals that the De La Vergne Company profited by the contract, and the harsh criticisms of its conduct indulged in by the court, were shown to be wholly unfounded. Mr. Knight, who represented the majority of the creditors in the assignment proceedings, testified that the De La Vergne Company never received any of the assets (R. 101); Mr. Jenkins, the assignee, made the same statement (R. 110); Mr. Bender, the manager of the De La Vergne Company, testified to the same effect (R. 194, 195); Louis De La Vergne also (R. 205); Louis Barron, assistant manager, also (R. 220); also Charles H. Cone, the former secretary (R. 243). There is also the affirmative proof in the record, and it was found by the court (R. 422, 423), that on May 4, 1891, *only eighteen days after the date of the contract, and before the date fixed therein for its execution*, the court entered an order to sell all the assets of the insolvent company, and they were subsequently sold to other than the defendants. (R. 424.)

Instead of being a case where the petitioner had received value, as originally supposed by the Court of Appeals, the record presents a case where a large recovery was sought for the confessedly partial delivery (36 U. S. App., 194) of stock in an insolvent corporation, forbidden by its charter to have an indebtedness beyond its capital stock, and yet shown to have been indebted to more than five times its valid stock, if we are to believe the recitals of the contract of April 16, 1891, that its stock was $100,000. The hardship and wrong was wholly on the other side. There was not a scintilla of evidence to the contrary.

The case was again submitted to the court without the

intervention of a jury, by stipulation in writing waiving a jury, and the court was requested to find the facts specially, together with conclusions of law therefrom.

The requested findings of fact submitted by the defendants are found in the Record (375–414). The propositions of law submitted by the defendant are also set out in the Record (414–416). The court found the facts specially. (R. 417–441.)

It will be noticed that the first request for finding submitted by the defendant company was as follows:

"I.

"The De La Vergne Refrigerating Machine Company is, and was at the time of the commencement of these actions, a corporation organized under the laws of the state of New York governing the organization of manufacturing corporations enacted on the 17th day of February, 1848, entitled 'An Act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes,' and which laws, in and by the terms thereof, provide that 'it shall not be lawful for such company to use any of their funds in the purchase of any stock in any other corporation;' and said corporation, during the year 1890 and prior and subsequent thereto, was engaged in the business of manufacturing and selling refrigerating machinery, having its principal office and place of business at the foot of 138th Street in the City and State of New York." (R. 375, 376.)

The court found upon this point:

"I.

"The De La Vergne Refrigerating Machine Company is, and was at the time of the commencement of these actions, a corporation organized under the laws of the State of New York governing the organization of manufacturing corporations enacted on the 17th day of February, 1848, entitled 'An Act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes,'

and acts supplemental or amendatory thereof." (R. 417.)

The difference consists merely in the failure to find as a fact the prohibitory language quoted from the laws of the State of New York, which under some circumstances would not be material, as the court might take judicial notice thereof and administer relief accordingly. It is submitted, however, that here the strictness applying to a special verdict was requisite, and that the parties were entitled to a finding upon every material issue in the case. The defendant company asked the court to hold as a conclusion of law:

> "The stock of the Consolidated Company was a part of the consideration for the promise of the De La Vergne Company to pay $100,000 in its own stock, or in cash, and the consideration being indivisible, and being illegal so far as the stock was concerned, the contract is illegal and void." (R. 415.)

The court found nothing upon this subject, and thus it happened that the findings were silent upon issues distinctly raised by the pleadings and upon which requests as to fact and law had been clearly made. There was no trial upon these issues. The questions were properly preserved by exceptions (R. 441, 442, 443), bill of exceptions, assignment of error. (R. 466, 469, 470.)

A writ of error was taken to the Court of Appeals; there was a summons in severance (R. 473, 474), where the cause was argued and submitted to Judges Thayer and Sanborn, who handed down the following *per curiam* opinion:

> "PER CURIAM. The judges are divided in opinion upon the question whether or not the contract which is the basis of this action was *ultra vires* the De La Vergne Refrigerating Machine Company, and are of opinion that the other questions presented should be

> determined in favor of the defendants in error. The judgment below is therefore affirmed by a divided court."

It has thus come about that, although the defendant company, by proper pleading and evidence, has sought to defend itself against this contract as prohibited by the laws of the state to which it owes its existence, yet it has been unable to obtain the opinion of any court thereon—the trial court, though making special findings of fact, choosing to remain silent upon this subject, and the Court of Appeals being equally divided thereon.

It was doubtless owing to this extraordinary condition of affairs that the two judges composing the Court of Appeals suggested that an application be made to this court for a writ of *certiorari*, that the issue might be determined and the party not mulcted in a large sum without having its principal defense passed upon by any court.

We, as counsel presenting the petition, feel that there are other such manifest errors in the record that it should be brought here as an entirety and all the questions receive the benefit of the judgment of this court. For example, the defendant John C. De La Vergne died testate after the action of the Court of Appeals reversing the first judgment and before any evidence was taken. He was not represented in the taking of the testimony. He was represented at the trial by William C. Richardson, Public Administrator of the City of St. Louis, notwithstanding the fact that the defendant company offered to show that he had no estate in the State of Missouri (R. 38, 39, 374); and the court below finds a judgment against such administrator, *notwithstanding the fact that the court below in its finding of facts does not find that John C. De La Vergne is dead.* This subject is not mentioned with the intention of discussing it on the present

application, but simply to show the incomplete nature of the findings in the court below, upon which the judgment purports to be based.

On the present application, the argument will be confined to the single question of *ultra vires*, upon which the trial court was silent and concerning which the Court of Appeals divided; it being assumed that if this court grants the petition for *certiorari* we shall be permitted, if the court considers the entire record, to file a brief and be heard in argument upon the other errors assigned.

BRIEF.

I.

The assets of the Consolidated Company, insolvent, being in the hands of an assignee under the insolvent laws of Illinois and in due process of administration, the stock owned by the respective plaintiffs was the only thing attempted to be delivered under the contract, and was the only thing capable of passing by such contract, and must, therefore, be deemed the subject of the contract.

Humphreys v. *McKisook*, 140 U. S., 304.
Smith v. *Hurd*, 12 Metc., 371, 385.
Railroad Co. v. *Howard*, 7 Wall., 392.
Whistler v. *Foster*, 14 C. B. (N. S.), 248.
Fawcett v. *Osborne*, 31 Ill., 425.
Benton v. *Curyea*, 40 Ill., 320.
Story on Sales (3rd Ed.), Secs. 188, 423.
Linn v. *Thornton*, 1 C. B., 379.
Huling v. *Cobell*, 9 W. Va., 522.
Low v. *Pew*, 108 Mass., 349.

That all the title of the Consolidated Ice Machine Company passed by the deed to the assignee on October 14, 1890, leaving no title, legal or equitable, in the insolvent company or its individual shareholders to which the contract of April 16, 1891, could attach.

Weber v. *Ulich*, 131 Ill., 520, 533, 534.

Walker v. *Ross*, 150 Ill., 56.

Spindle v. *Shreve*, 111 U. S., 545.

As to the claim that the transfer of the stock was only incidental to the main purpose of the contract, which the respondents assert and one of the judges intimated was to convey the assets subject to the debts, and the stock was therefore only incidental as a means for further assurance of title, it is submitted that it was even then *a part* of the consideration for an indivisible promise, and being unlawful, the entire contract is void.

Bishop on Contracts, Sec. 74.

Widoe v. *Webb*, 20 Oh. St., 431.

Carleton v. *Woods*, 28 N. H., 290.

Deering v. *Chapman*, 22 Me., 488.

Ocean M. Co. v. *Polleys*, 13 Pet., 157, 164.

McBlair v. *Gibbs*, 17 How., 232.

Dent v. *Ferguson*, 132 U. S., 50, 64–66.

Armstrong v. *American Ex. Bank*, 133 U. S., 433, 469.

II.

The stock of the Consolidated Ice Machine Company was a part of the consideration for the promise of the De La Vergne Company to pay $100,000 in its own stock or in cash. The contract is ultra vires of the vendee company, and therefore illegal and void.

Laws of New York, 1848, Ch. 40, Sec. 8.

Id., 1890, Ch. 564, Sec. 40.

Boone, Law of Cor., Sec. 107.

Green's Brice *Ultra Vires*, p. 91, note *b*.

1 Morawetz Private Cor., Secs. 431, 433.

People v. *Chicago Gas Trust Co.*, 130 Ill., 268, 284.

Milbank v. *N. Y., L. E. & W. R. R. Co.*, 64 How. Pr., 20.

Talmage v. *Pell*, 7 N. Y., 328.

St. L., V. & T. H. R. Co. v. *T. H. & I. R. Co.*, 145 U. S., 393.

Central Transportation Co. v. *Pullman Car Co.*, 139 U. S., 24.

California Nat'l Bank v. *Kennedy*, 167 U. S., 362.

Marble Co. v. *Harvey*, 92 Tenn., 116.

Union Pacific Ry. Co. v. *Chicago, M. & St. P. Ry. Co.*, 163 U. S., 564.

Alexander v. *Cauldwell*, 83 N. Y., 480.

Davis v. *Old Colony R. R.*, 131 Mass., 258.

Applying to the act of 1890, supra, enacted before the contract upon which action was brought, but going into

force fifteen days after it was signed, but before the delivery upon either side under the contract.

Baily v. *De Crespigney*, L. R. 4, Q. B., 180.
Newby v. *Sharp*, L. R., 8 Ch. Div., 39.
2 Schouler Personal Prop., 287.
Benjamin on Sales, 571.
Campbell on Sales, 315.

Applying to the contract to increase the capital stock of the De La Vergne Company.

1 Morawetz on Cor., Sec. 434.
N. Y. & N. H. R. R. Co. v. *Schuler*, 34 N. Y., 30.
Railway Co. v. *Allerton*, 18 Wall., 235.
Scovill v. *Thayer*, 105 U. S., 143.

III.

The petitioner was entitled in the court below to a special finding upon the issue of ultra vires raised by its sixth, seventh and eighth pleas (R. 22-24), and the court having refused to find upon this issue, the judgment is void.

Cannot go to other parts of record to help finding out.

The E. A. Packer, 140 U. S., 360, 364, 365, bottom of page.

Special findings have same effect as special verdict by jury.

Saltonstall v. *Britwell*, 150 U. S., 417, 419.

Special verdict is had unless it finds all the facts in issue.

Ft. Scott v. *Hickman*, 112 U. S., 150, 164.
Ward v. *Cochran*, 150 U. S., 597, 608.

ARGUMENT.

I.

The assets of the Consolidated Company, insolvent, being in the hands of an assignee under the insolvent laws of Illinois and in due process of administration, the stock owned by the respective plaintiffs was the only thing attempted to be delivered under the contract, and was the only thing capable of passing by such contract, and must, therefore, be deemed the subject of the contract.

Since the question of *ultra vires* was raised, the claim is put forward that there was no sale of stock by the plaintiffs and no purchase of stock by the defendants below; that the sale was of the assets of the insolvent corporation theretofore conveyed by the corporation to the assignee, subject to the payment by the assignee of the debts, and that the transfer of the stock was a mere incident collateral to the main purpose of the contract. This interpretation of the contract is not sustained by its language, or the situation and conduct of the parties, and, even if the contention were admitted, for the sake of argument, it would not avail the respondents, as they would still be compelled to admit that the transfer of the stock was *a part* of the consideration.

The stock was the only property owned by the respondents. It was the only subject of attempted transfer. If we admit, for the purpose of argument, that upon the payment of the debts the title would revert, the reversion would be to the corporation—not to the shareholders. If an equity existed, it belonged to the corpora-

tion and not to the shareholders. If the corporation had anything to convey, the transfer would have been in the name of the corporation, by its proper officers thereunto duly authorized. If the other party to the contract failed to pay the consideration, the corporation, not the shareholders, either jointly or severally, must bring action to obtain redress.

The idea that all the shareholders of a corporation may, by uniting in a contract or deed, transfer the property of a corporation, is a mistake. If corporate property was the subject of transfer in this case, it should have been applied to the payment of the debts, which the record shows are, after a wise and economical administration of the estate, yet unpaid to an amount exceeding $150,000. Again, if corporate property was the subject of transfer, the consideration therefor could only be obtained by the plaintiffs in the several actions through the ownership of their several shares of stock, and the defendant company could acquire the property, if at all, in view of the previous conveyance to the assignee, only through the ownership of the stock. This made the stock, in any view of the case that it is possible to take, an essential element of the transfer.

It is thought that these several statements are abundantly sustained by the authorities.

In the case of *Humphreys* v. *McKissock*, 140 U. S., 304, the facts were that the old Wabash Company had executed a mortgage on its Council Bluffs Division, together with all the privileges, rights, franchises, real estate, right of way, depots, depot grounds, side-tracks, water-tanks, engines, cars and other appurtenances thereunto belonging. The Wabash and six other railroad companies organized an elevator company to build and operate an elevator at Council Bluffs, each company sub-

scribing to one-seventh of the stock. The mortgagee of the Council Bluffs Division claimed under his mortgage what he described as the one-seventh interest of the Wabash in the elevator. The court denying this claim, says that the facts found by the court, which decided in favor of the mortgagee, "show beyond controversy the independent existence of that (the elevator) corporation, and that the railroad company had no specific interest in its elevator or other property which it could mortgage."

The court quotes with approval what was said by Chief Justice Shaw in *Smith* v. *Hurd* 12 Metc., 371, 385, viz:

> "The individual members of a corporation, whether they should all jointly or each act severally, have no right or power to intermeddle with the property or concerns of the bank or call any officer, agent or servant to account or discharge them from any liability. Should all the stockholders join in a power of attorney to anyone, he could not take possession of any real or personal estate, any security or chose in action; could not collect a debt or discharge a claim or release damage arising from any default; *simply because they are not the legal owners of the property*, and damage done to such property is not an injury to them. Their rights and their powers are limited and well defined."

To this same effect is *Pullman Co.* v. *Mo. Pac. Co.*, 115 U. S., 587.

"*Nemo dat quod non habet.*" This maxim expresses the principle that one who has no title cannot confer a title as expressed by Willis, J., in *Whistler* v. *Foster*, 14 C. B. (N. S.), 248.

The idea has been reiterated in the form: "No one can sell a right when he himself has none to sell;" and it has been declared that this proposition is so self-evident that argument cannot elucidate or strengthen it.

14 Cent. Law J., 146.

"The general rule of law, sanctioned by common sense, is that no man can, by his sale transfer to another the right of ownership in a thing wherein he himself has not the right of property."

Fawcett v. *Osborn*, 32 Ill., 425.

Benton v. *Curyea*, 40 Ill., 320.

"The general rule is, that the subject of the sale must belong to the vendor, and that he can sell no more than the interest, which he legally possesses."

Story on Sales (3rd ed.), Sec. 188.

"Again if the vendor wholly fails to make a title to the vendee in an executory contract, the vendee may rescind the contract."

Story on Sales (3rd ed.), Sec. 423.

Tindal, C. J., in delivering the opinion of the court, in *Linn* v. *Thornton*, 1. C. B., 379, said:

"It is not a question whether a deed might not have been so framed as to have given the defendant a power of seizing the future personal goods of the plaintiff, as they should be acquired by him, and brought on the premises, in satisfaction of the debt, but the question arises before us on a plea which puts in issue the *property* in the goods, and nothing else; and it amounts to this, whether by law a deed of bargain and sale of goods can *pass the property* in goods which are not in existence, or, at all events, which *are not belonging to the grantor at the time of executing the deed.*" Held, in the negative.

In *Huling* v. *Cobell*, 9 W. Va., 522, it appeared that an agricultural society assigned for the benefit of its creditors the proceeds of a fair about to take place on its grounds. It was held that such an assignment was void as against the lien of an execution issuing before the payment of the proceeds to the creditors. Mr. Justice Green, in his opinion, discusses the general subject, and says the rule is *that a sale of property in which the vendor has no present interest is void.*

> "It is an elementary principle of the law of sales, that a man cannot grant personal property in which he has no interest or title. To be able to sell property, he must have a vested right in it at the time of the sale."
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> *Low* v. *Pew*, 108 Mass., 349.

In *McGoon* v. *Ankeny*, 11 Ill., 558, it was held to be law that the real owner of personal property cannot sell his right or title in it to another while it is in the actual or adverse possession of one who claims title to it.

> "Hence, the general rule is stated to be, that a purchaser of property takes only such title as his seller has, and is authorized to transfer; that he acquires precisely the interest which his seller owns, and no other or greater."
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> *Barnard* v. *Campbell*, 55 N. Y., 460.

If, after the payment of all debts, there should remain in the hands of the assignee any surplus of the proceeds of sales and collections, such surplus belongs to the assignor. But this right of the assignor to the surplus does not exist until all debts are paid. When they are paid, it is called into existence.

Burrill on Assignments, 712.

Butler v. *Thompson*, 4 Abb. N. C., 290.

Briggs v. *Davis*, 21 N. Y., 574.

Sandmeyer v. *Dakota F. & M. Co.* (S. Dak.), 50 N. W., 353.

Before debts are paid this right is uncertain, indefinite, a mere possibility. It cannot be determined until debts are paid, and until that time it is not known whether there will be a surplus or a deficit; no doubt this right to the surplus, if any, is a valuable right, but it is held adversely. An assignment is made for the benefit of creditors, and until they are paid everything of value is vested in the assignee in trust for them. Such indefinite

right as this resulting trust in favor of the assignor is not subject to sale by shareholders. It belonged to the assignor, which, in the present case, is the Consolidated Company.

The Illinois statutes respecting assignments, in so far as it provides for a discontinuance of proceedings, is as follows, viz.:

> "All proceedings under the Act of which this is amendatory, may be discontinued upon the assent, in writing, of *such debtor*, and a majority of his creditors in number and amount; and in such cases, all parties shall be remitted to the same rights and duties existing at the date of the assignment, except so far as such estate shall have already been administered and disposed of; and the court shall have power to make all needful orders to carry the foregoing provision into effect."
>
> Revised Statutes (Ill., 1897), "Assignments," Section 15.

Nothing could be done under this statute except by aid of the debtor, the Consolidated Company. The assent requisite is that of the debtor and a majority of the creditors in number and amount.

The De La Vergne Company did not by the contract become the debtor, for it expressly refused to assume liability for debts of the Consolidated Company. (Sixth article of contract, R. 45.) It had bargained for the stock of the company, and through this stock, and only through this stock, could it secure the assent in writing of the debtor.

So the contract, having in view the fact that the assent of the debtor is necessary to a discontinuance of the assignment proceedings, provides in its fourth clause that the stock shall be assigned as prescribed, "for the purpose of placing the said party of the third part (the De

La Vergne) *in complete control* of the assets of the party of the first part, subject to the legal rights of said assignee and the creditors of said party of the first part."

The stock was necessary not only to "complete control," but it was necessary to any control whatever.

Conceding that the Consolidated Company was an empty shell, in the sense that it was insolvent, and did not contemplate a resumption of business, the fact remains that the assets which had belonged to it could be reached only through it, and it could be reached only through its stock.

The stock of the Consolidated Company was then the vital element of the consideration to the De La Vergne Company, even though the value of this stock was to be realized through the acquisition by the De La Vergne of the former assets of the Consolidated Company.

Assume that the contract contained no provision for a sale of stock, and leave the contract one in form and in fact as the plaintiffs say it is in essence, one for the sale of the former assets of the Consolidated, subject to the rights of the assignee and the creditors, and what would the defendant receive by the contract?

The right to discontinue the assignment, a majority of the creditors in number and amount consenting, the only right of any kind in respect to its assets remaining to the Consolidated Company after the assignment, was not conveyed by the contract and could not be so conveyed.

No court would at the suit of the De La Vergne Company compel it to assent. The matter was one between it as a debtor and its creditors.

It seems clear, therefore, from the law of Illinois, and from the language of the contract, that this possibility of discontinuing the assignment by composition or other arrangement with creditors was the one thing of possible

value connected with the assets of the insolvent company. This and the corporate existence might be utilized for some purpose, but, and this is true as to both of them, *only through the stock.*

We are bound to conclude that the stock was a part of the consideration.

On the 1st day of December, 1891, Mr. Jenkins, as assignee of the Consolidated Company, sold to John Featherstone's Sons the good-will, machinery, patterns, etc. (R. 93.)

The bills and accounts receivable were collected by the assignee and by Knight and Butz, and distributed by them among the creditors.

There is, therefore, nothing that the defendants received unless it be the shares of stock. It has been shown that these shares were not evidence of any present interest in property.

But let us assume that stock ownership in a corporation which has executed an absolute assignment under the insolvent law by which all its property and every *legal* and *equitable interest therein* is vested in the assignee means the same thing as stock ownership in a solvent running corporation. What is the situation then?

The certificates of stock were evidence of the ownership of a distributive share in the surplus after debts are paid.

> "A share of the capital stock merely gives the right to partake, according to the amount put into the fund, of the surplus profits of the corporation, and ultimately on the dissolution of it, of so much of the fund thus created as remains unimpaired and is not liable for debts of the corporation."
>
> Thompson, Commentaries on Law of Corporations, Sec. 1071.

This is a fundamental principle. It is not necessary to cite further authorities.

The assets lacked $150,000 of being sufficient to pay the debts of the Consolidated Company. (R. 109.) What is the value of a distributive share in a deficiency of $150,000?

It is idle to talk of the shares in the Consolidated Company being evidence of a distributive share in anything of value, at the time of the contract.

If the corporation was not insolvent, it was a fraud to assign.

> *Gardner* v. *Commercial National Bank*, 95 Ill., 298.

But this assumption cannot be made; the title to all the assets passed to the assignee absolutely. Distributive ownership in the company is then impossible. The only thing of value that possibly did not pass to the assignee is the franchise, the right to be a corporation.

But all the title of the Consolidated Ice Machine Company passed by the deed of the assignee on October 14, 1890, leaving no title, legal or equitable, in the insolvent company or its individual shareholders, to which the contract of April 16, 1891, could attach.

By the agreed statement of facts, as well as by the express terms of the deed of assignment, there passed to the assignee all the property of the Consolidated Ice Machine Company wherever situated, including the patent rights, outstanding accounts "*and the good-will of its business.*" (R. 383.) This good-will was subsequently advertised for sale by the assignee, under the order of the court, together with $100,000 of the capital stock of the company not embraced in the sale to De La Vergne. (R. 152.) The assets and good-will were subsequently sold, likewise under the order of the court, to Clarence A. Knight

and Otto C. Butz, as trustees, for $309,000 of the claims against the estate, including a portion of the complainant's herein. (R. 156, 158, 159.) Knight and Butz afterwards, under order of court, sold the assets so acquired, including the good-will, to John Featherstone's Sons; and subsequently, by formal deed, conveyances were made by these respective parties. (R. 93, 90.)

It is thus clearly shown by the record that the assumption of the learned court deciding this case (36 U. S., 184), that the De La Vergne Company acquired the good-will or any portion of the assets of this company at any time, is wholly erroneous, as by undisputed evidence in the case (R. 109) there remains $150,000 of the indebtedness of the company yet unpaid after the estate is fully administered.

In the absence of these express provisions of the deed of assignment and orders of court, and conveyances made in pursuance thereof, such an assignment, under the statute of the State of Illinois regulating assignments by insolvent debtors, left no title, legal or equitable, in the insolvent Consolidated Company which was the subject of conveyance. Being an Illinois corporation, assigning under the laws of the State of Illinois, the effect of the assignment has, of course, to be determined by the decisions of the highest court of that state.

In *Weber* v. *Mick*, 131 Ill., 520, 533, 534, the court said that the

> "assignment is an absolute appropriation of the property to the payment of the debts," passing both legal and equitable title to the property "absolutely beyond the control of the assignor." . . "Such assignments have always been understood to be instruments voluntarily executed by a failing debtor by which he assigns to some third person, as assignee

or trustee, the whole, or sometimes the bulk, of his property, to be by such trustee distributed among the assignor's creditors, in satisfaction of their demands."

In Burrill on Assignments, 10, it is said:

> "An assignment is likewise an absolute conveyance by which both legal and equitable estate is divested out of the grantor, but the title vested in the assignee is subject to the uses and trusts in favor of the creditors, and upon their satisfaction a trust results in favor of the assignor in the residue of the unappropriated property or its proceeds."

The Supreme Court of the United States, in passing upon the effect of an assignment of an insolvent debtor under the Illinois law, in *Spindle* v. *Shreve*, 111 U. S., 545, said:

> "The Court of Appeals of Kentucky, in *Knefler* v. *Shreve*, 78 Kentucky, 297. had before it the very question as to the construction of this deed, and decided that all the estate and interests in property, which, at its date, the grantor held, which he could alien, and which was liable at law or in equity for the payment of his debts, passed by its terms; and in that decision we concur."

In *Walker* v. *Ross*, 150 Ill., 56, the court said:

> "These cases further hold that there must be an absolute transfer of the whole interest of the assignor, legal and equitable, in the property assigned in trust for the benefit of creditors."

In *Stoddard* v. *Gilbert*, 163 Ill., 131, 135, there was an attempt to convey property while it was yet in the hands of the assignee, and it was held that the agreement could only become operative upon the discontinuance of the proceedings.

By these decisions it is established that there was no property right of any nature or description whatsoever

remaining in Consolidated Ice Machine Company on April 16th, 1891, that could be made the subject of conveyance or transfer by that company. As has been said, all property rights of the insolvent corporation had vested in its assignee. Any other decision would be monstrous, as it would enable shareholders to protect their interests without paying their creditors.

It thus appears that the only property or property right that the parties of the first and second part to the contract of April 16th, 1891, could convey were their individual shares in the capital stock of the corporation; and certainly their ownership of these shares is the only right possessed by them and which they could convey, which would justify an action by them against the petitioner, or its president. This seems to make it unnecessary to consider the argument that was addressed to the Circuit Court of Appeals, and which seems to have impressed one of the judges, that the transfer of the stock was only incidental to the contract, and therefore the defense of *ultra vires* could not wholly avoid it. In adopting this proposition the learned judge overlooked a distinction which he had himself previously drawn in the case of the *Illinois Trust & Savings Bank* v. *Arkansas City*, 40 U. S. App., 257, 274, where he said:

> "It is that when a part of a divisible contract is *ultra vires*, but neither *malum in se* nor *malum prohibitum*, the remainder may be enforced, unless it appears from a consideration of the whole contract that it would not have been made independently of the part which is void. *Oregon Steam Navigation Company* v. *Winsor*, 20 Wall., 64, 70; *Reagan* v. *Farmers' Loan and Trust Company*, 154 U. S., 362, 395; *Western Union Telegraph Co.* v. *Burlington & Southwestern Ry. Co.*, 11 Fed. Rep., 1, 4, and cases cited in note at page 12; *Saginaw Gas-Light Co.* v. *City of Saginaw*, 28 Fed. Rep., 529, 540."

In the case at bar the transfer of the stock was a part of the consideration. The contract was indivisible in this respect, and the only attempted performance was that of a partial delivery of the stock. There was no attempt to deliver anything else. The promise to issue a like amount of stock of the De La Vergne Company, or, at the option of Mr. John C. De La Vergne, to pay $100,000 in money—an option which he never exercised—was only to become binding upon the delivery of $100,000 of the stock of the insolvent company, and was a promise to the shareholders as such. The delivery and payment were to be made to the individual shareholders, in proportion to their respective holdings. It was not, therefore, using the language of the learned court in the former opinion, in which he is sustained by authority, "a divisible contract . . . neither *malum in se* nor *malum prohibitum*," but it was an indivisible contract, *malum prohibitum* by two express enactments of the laws of the State of New York governing the rights of the De La Vergne Company, as will appear in the discussion of the next proposition.

Mr. Bishop, in his work on Contracts, Section 74, thus states the rule:

> "Where the consideration for an indivisible promise is *in part* something done in violation of law, and in remainder some lawful thing, the promise cannot find support on the lawful part without resting also on the unlawful, and the whole will be void. But if there are two promises, the one founded on the unobjectionable in the consideration and the other on the evil, the former will be sustained and the latter will fail."

This statement of the law does not require argument or elaboration in this court. Other authorities are cited in the brief.

II.

The stock of the Consolidated Ice Machine Company was a part of the consideration for the promise of the De La Vergne Company to pay $100,000 in its own stock or in cash; the contract is ultra vires of the vendee company, and therefore illegal and void.

A corporation has such powers as are given it by its charter, and such implied powers as are necessary to carry out the corporate purpose.

This principle is well settled. In *Thomas* v. *Railroad Co.*, 101 U. S., 71, Mr. Justice Miller, speaking for the Supreme Court of the United States, said:

> "We take the general doctrine to be in this country, though there may be exceptional cases and some authority to the contrary, that the powers of corporations organized under legislative statutes are such, and such only, as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others."

Dartmouth College Case, 4 Wheat., 636.

Perrine v. *Chesapeake, etc., Canal Co.*, 9 How., 177, at 184.

Metropolitan Bank v. *Godfrey*, 23 Ill., 531.

Caldwell v. *City of Alton*, 33 Ill., 417.

1 Morawetz Corporations, Sec. 316.

Taylor on Corporations, Sec. 120.

Bell, C. J., in *Downing* v. *Mt. Washington Road Co.*, 40 N. H., 230, said:

> "Corporations are creatures of the legislature, having no other powers than such as are given to them by their charters, or such as are incidental, or necessary to carry into effect the purposes for which they were established."

It is not, nor can it be, claimed that the charter under which the De La Vergne Company assumed to act gave it the power to purchase stock in another corporation.

It needs no argument to show that the purchase of stock in another corporation is not necessary to carry into effect the purposes of incorporation.

It matters not what the general rule may be, as such companies as the De La Vergne are prohibited from using funds to purchase stock in another corporation. Sec. 8, Chapter 40, Laws of 1848, of the State of New York, provides:

> "It shall not be lawful for such company to use any of their funds in the purchase of any stock in any other corporation."

It is established that The De La Vergne Refrigerating Machine Company was organized under this act and the amendments thereto. (R. 300.) The law of New York continued to prohibit investments by one manufacturing company in the stock of another until the enactment of Chapter 564, N. Y. Session Laws of 1890, approved June 7, 1890, and going into effect May 1, 1891. Section 40 of said chapter provides that:

> "Any domestic corporation, transacting business in this state, and also in other states or foreign countries, may invest the funds in the stocks, bonds, or securities of other corporations owning lands in this state or such states, if dividends have been paid on such stocks continuously for three years immediately before such loans are made, or if the interest on such bonds or securities is not in default, and such stock, bonds and securities shall be continuously

> of a market value 20% greater than the amount loaned or continued thereon; . . . no corporation shall use any of its funds in the purchase of any stock of its own or any other corporation, unless the same shall have been *bona fide* pledged, hypothecated, or transferred to it, by way of security for, or in satisfaction or part satisfaction of, a debt previously contracted in the course of its business, or shall be purchased by it at sales upon judgments, orders, or decrees which shall be obtained for such debts or in the prosecution thereof."

It affirmatively appears in the record, by a full copy of all directors' meetings of the Consolidated Ice Machine Company, as well as by testimony of witnesses, that the Consolidated Ice Machine Company never paid a dividend on its stock during its existence; and there is nothing to dispute the inference arising from the fact that its capital stock was $200,000, of which $100,000 was unpaid, except the sum of $10,000, and that its indebtedness was $550,000, which upon the administration of the assets has left $150,000 wholly unpaid—that $100,000 of the stock of the Consolidated Company never was continuously of a market value twenty per cent. greater than the price which it is alleged Mr. De La Vergne had, at his option, agreed to pay therefor.

The stock of the Consolidated Company was part of the consideration to the De La Vergne Company. This question has been adjudicated by the Circuit Court of Appeals as between these parties. (36 U. S. App., 184, 187.)

That was one of the questions in controversy on the first trial. Whether it was a *legal* consideration was a question not suggested.

In the statement of the case, in the first paragraph of the opinion, Judge Sanborn says the suit is by the German Savings Institution—

> "for that portion of the purchase price of the assets, good-will, *and capital stock* of the Consolidated Ice Machine Company, a corporation, which the defendants in error promised to pay it," etc.

The court held, as matter of law, that the Consolidated Company stock was part of the consideration, and they say that if the small minority of stock not transferred was of any value,

> "the defendants may undoubtedly show that fact under proper pleadings, and offset the damage they have sustained by the failure to assign it, against the $100,000 they promised to pay for the substantial benefits of this contract."

In the absence of express statutory authority, a corporation cannot purchase stock of another corporation.

Boone on the Law of Corporations, Sec. 107, thus states the law:

> "Without a power specifically granted, or necessarily implied, a corporation cannot become a stockholder in another corporation, and especially where the object is to obtain the control or affect the management of the latter."

In Green's Brice's *Ultra Vires*, p. 91, note *b*, it is said:

> "In the United States a corporation cannot become a stockholder in another corporation unless by power specifically granted by its charter, or necessarily implied in it."

Morawetz on Private Corporations, Secs. 431, 433, says:

> "A corporation has no implied right to purchase shares in another company for the purpose of controlling its management. . . . A corporation cannot, in the absence of express statutory authority, become an incorporator by subscribing for shares in a new corporation, nor can it do this indirectly through persons acting as its agents or tools."

In *People* v. *Chicago Gas Trust Co.*, 130 Ill., 268, at 284 the court said:

> "It has been held in many cases, that in the United States corporations cannot purchase, or hold, or deal in the stocks of other corporations, unless expressly authorized to do so by law, and that one corporation cannot become the owner of any portion of the capital stock of another corporation, unless authority to become such is clearly conferred by statute."

The following is taken from the syllabus of the case:

> "The gas trust company mentioned was incorporated under the general law for two purposes, as expressed in the articles of association: First, for the purpose of erecting and operating gas works for the manufacture and sale of gas in Chicago and other places in this state; and second, 'to purchase and hold or sell the capital stock, or purchase, or lease, or operate the property, plant, good-will, rights and franchises of any gas works or gas company or companies, or any electric company or companies, in Chicago or elsewhere,' etc.
>
> "The company sought to exercise the powers claimed under the second clause only, and for that purpose bought a majority of the shares of all the stock of all the gas companies in Chicago, being four in number, whereby it might have control of all the gas companies in the city, and thus destroy competition and monopolize the gas business. *Held*, that the corporation so formed was not for a lawful purpose, and that all acts done by it toward the accomplishment of such object were illegal and void."

At various times during the years 1873 and 1874 the Erie Railway Company purchased more than one-half of all capital stock of the Buffalo, New York & Erie Railroad Company, and paid for the same out of its corporate funds. *Held*, that such purchase was not necessary in the exercise of any of its corporate powers;

that it was unauthorized and in violation of the statute, and was consequently *ultra vires.*

Milbank v. *New York, Lake Erie & Western R. R. Co.*, 64 Howard's Practice Reports, 20.

In *Talmage* v. *Pell*, 7 N. Y., 328, it was held that a corporation has no power to purchase the stock of other corporations for the purpose of selling them for profit, or as a means of raising money, except when such stocks have been received in good faith as security for a loan made or a debt due such corporation, or when taken in payment of such loan or debt.

In the case of *The Mechanics' Mutual Savings Bank* v. *Meridan Agency Company*, 24 Conn., 159, it was held that a company organized to do a general insurance agency, commission and brokerage business has no power to subscribe to the stock of a savings bank and building association.

In the case of *The Central Railroad Company* v. *The Pennsylvania Railroad Company*, 31 N. J. Eq., 475, it was held that a corporation cannot, in its own name, nor in the name of individuals, subscribe for stock or be a corporation under the general railroad law.

Kennedy v. *Railroad*, 62 N. H., 537.

Hotel Co. v. *Schram*, 6 Wash., 134.

Franklin Co. v. *Lewiston Inst. for Savings*, 68 Me., 46.

It is thus established by the great weight of authority that an agreement by one corporation to purchase stock in another is *ultra vires.* An *ultra vires* contract is illegal and void.

St. Louis, Vandalia & Terre Haute R. Co. v. *Terre Haute & Indianapolis R. Co.*, 145 U. S., 393.

It is shown by the report of the De La Vergne case, in 36 U. S. App., p. 190, that it was mistakenly considered in the nature of a suit for specific performance. No action can be brought to compel specific performance of an *ultra vires* contract, which is illegal and void.

Bank of Michigan v. *Niles*, Walker's Chan. R. (Mich.), 99.

In the case of *The Central Tansportation Co.* v. *Pullman Car Co.*, 139 U. S., 24, the plaintiff company had leased and transferred all of its property of every kind to the defendant company, which was engaged in a similar and competitive business. The lessee company undertook to pay all of the debts of the lessor company, and to pay to it annually the sum of $264,000 for a term of ninety-nine years. The suit was for a part of the installment for the last year before suit. The defense of *ultra vires* was interposed and sustained, the court holding that the sale was unauthorized and in excess of the power of the selling company. It was urged for the plaintiff, as in this case, that, even if the contract was void, because *ultra vires* and against public policy, yet that, having been fully executed on the part of the plaintiff, and the benefits of it received by the defendant for the period covered by the declaration, the defendant was estopped to set up the invalidity of the contract as a defense to an action to recover the compensation agreed on for that period.

After reviewing the prior decisions upon this branch of the case, the court said (p. 59):

> "The view which this court has taken of the question presented by this branch of the case, and the only view which appears to us consistent with legal principles, is as follows: A contract of a corporation which is *ultra vires* in the proper sense, that is

to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the Legislature—*is not voidable only but wholly void, and of no legal effect.* The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it. When a corporation is acting within general scope of the powers conferred upon it by the Legislature, the corporation, as well as the persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action, because such requisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation nor the other party to the contract can be estopped, by assenting to it or by acting upon it, to show that it was prohibited by those laws.

"A contract *ultra vires*, being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the Courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as it could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it. In such case, however, *the action is not maintained upon the unlawful contract, nor according to its terms*, but on an implied contract of the defendant to return, or, failing to do that, to make compensation for property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract."

The case at bar is not to recover the value of the stock delivered, but to enforce the unlawful sale of stock against

the corporation prohibited by its charter from making the purchase.

In the case of *California National Bank* v. *Kennedy*, 167 U. S., 362, which reasserts the principles laid down in *Central Transportation Co.* v. *Pullman Car Co.*, the court said:

> "The lease sued on having been executed by the defendant contrary to the express prohibition of the statute, which peremptorily forbade the corporation to transact any business unless to perfect its organization, and thus denied it the capacity to enter into any contract whatever, except in perfecting its organization, *the lease is void*, and cannot be made good by estoppel, and will not support an action to recover anything beyond the value of what the defendant has actually received and enjoyed."

In *Marble Company* v. *Harvey*, 92 Tenn., 116, the Marble Company, an Ohio corporation, contracted with Harvey to take shares in a Tennessee corporation doing a like business; the consideration was $6,000, the defendant assuming and agreeing to stand one-half the loss accruing to plaintiff in consequence of suits pending against the Tennessee corporation. The relief sought was to compel defendant to pay one-half the loss accruing. The defense of *ultra vires* was set up. It was held that "the suit is clearly in furtherance of the original, unlawful and void contract. That the contract has been executed by the plaintiff does not make it lawful or entitle it to an enforcement of it. It is in no sense a suit in disaffirmance."

This Tennessee case is so conclusive in its argument, and so exactly parallel in its facts to the case at bar, that any short citation does not enable the court to appreciate its importance in the present discussion. It shows that the contract in this case was executory, and that, to en-

able the plaintiffs below to recover, it is necessary for the court to give effect to a corporate act which is absolutely forbidden by the express terms of statutes regulating the powers of both the vendor and vendee companies.

It is urged by the plaintiffs in this case, as in the *Central Transportation Co.* v. *Pullman Car Co.*, that, even if the contract was void, because *ultra vires* and against public policy, yet that, having been fully executed on the part of the plaintiff, and the benefit of it received by the defendant, the defendant was estopped to set up the invalidity of the contract as a defense to an action to recover the consideration agreed on.

The Supreme Court, however, in the Central Transportation Co. case would not allow that defense to prevail, holding the contract *ultra vires* and void, and therefore no performance on either side could give the contract any validity, or be the foundation of any action upon it.

In *California Nat'l Bank* v. *Kennedy*, 167 U. S., 362, the bank became a stockholder in a savings bank, and while such stockholder received dividends on the stock. Both banks failed, and an attempt was made to charge the bank as a stockholder in the savings bank. By virtue of the federal statutes, under which the bank was organized, it had no power to become a stockholder in another corporation. The Superior Court of California adjudged the national bank to be the holder of shares in the savings bank and responsible to the creditors of the savings bank in proportion to its holdings. An appeal was taken to the Supreme Court of the state, which affirmed the judgment. On a writ of error to this court the judgment was reversed.

The court, speaking by Mr. Justice White, held that

> "a national bank has no power to deal in stocks, and cannot, therefore, acquire the stock of another corporation, except as incidental to its power to lend money on personal security."
>
> "The purchase by a national bank of the stock of another corporation, not as incidental to the banking business, *being void cannot be ratified, and therefore the bank is not estopped to deny its liabilities, for the debts of such corporation, though it has received dividends on the stock.*"

The reasoning of the learned court is shortly as follows: That corporations have such powers only as are conferred upon them by statute, quoting from *Central Transportation Co.* v. *Pullman Car Co.*

The power to deal in stock of another corporation being not expressly conferred upon national banks, nor an act which may be exercised as incidental to the powers expressly conferred, a dealing in stocks is consequently *ultra vires.*

Being such, it is without efficacy.

The learned court deals with the question of estoppel in the following manner:

> "The claim that the bank, in consequence of the receipt by it of dividends of the stock of the savings bank, is estopped from questioning its ownership and consequent liability, is but a reiteration of the contention that the acquiring of stock by the bank under the circumstances disclosed was not void, but merely voidable. It would be a contradiction in terms to assert that there was a total want of power by any act to assume the liability, and yet to say that by a particular act the liability resulted. The transaction, being absolutely void, could not be confirmed or ratified,"

and ends the opinion by quoting from the language of Mr. Chief Justice Fuller in *Union Pacific Ry. Co.* v. *Chicago, M. & St. P. Ry. Co.*, 163 U. S., 564:

> "A contract made by a corporation beyond the scope of its powers, express or implied, on a proper construction of its charter, cannot be enforced, or rendered enforceable, by the application of the doctrine of estoppel."

This, we submit, is a conclusive answer to the plaintiff's contention.

Granting, for the sake of argument, that the contract was entirely executed on the part of the Consolidated Company and that the De La Vergne Company got everything it bargained for (which we deny), it is not estopped from setting up the defense of *ultra vires*.

The agreement to purchase stock in the Consolidated Company was illegal and void. It was an agreement which the De La Vergne Company was not authorized to make. This action was originally brought to enforce the payment of the purchase price, and is clearly in furtherance of the original, void contract. It is in no sense an action in disaffirmance. A court of law will not aid in enforcing a contract which one of the parties had no authority to make, and which was illegal and void.

The only course the plaintiff could have pursued was to disaffirm the contract and sue the defendant on the implied contract to return; or, failing to do that, to make compensation for property which it had no right to retain.

The record clearly shows that the defendant received nothing which it could retain; there is not a scintilla of testimony in conflict with that statement.

John C. De La Vergne and the Consolidated Company and stockholders thereof knew, at the time the contract was made, that the De La Vergne Company had not the power to enter into the agreement by which they attempted to bind it. If they did not know of this want of power, they must be taken to have known it.

Therefore the maxim, "*In pari delicto potior est conditio defenditis*," applies.

The corporate charter is a public enactment, always open for inspection, and a party dealing with this creature of law is charged with knowledge of the contents of its charter, and cannot be heard to say that its powers were unknown.

Alexander v. *Cauldwell*, 83 N. Y., 480.

Davis v. *Old Colony R. R.*, 131 Mass., 258.

Mr. Justice Gray, speaking for the court in this case, said:

> "Every person who enters into a contract with a corporation is bound at his peril to take notice of the legal limits of its capacity, especially where, as in this Commonwealth, all acts of incorporation are deemed public acts, and every corporation organized under the general laws is required to file in the office of the Secretary of the Commonwealth a certificate showing the purpose for which the corporation is constituted."

Citing:

Whittenton Mills v. *Upton*, 10 Gray, 582, 598.

Richardson v. *Sibley*, 11 Allen, 65, 72.

East Anglian Railways v. *Eastern Counties Railway*, 11 C. B., 775.

> "This rule does not rest upon the ground that a charter or general incorporation law is a public statute of which all persons are deemed to have notice. It is a rule based on no technical doctrine, but upon the necessities of the case. It applies to foreign corporations (*Hoyt* v. *Thompson*, 19 N. Y., 208, 222; *Relfe* v. *Rundle*, 103 U. S., 222, 226) as well as to domestic corporations, and to corporations chartered by private acts of the legislature, as well as to those whose charters are a part of the general laws."

II Morawetz, Sec. 591.

In *Relfe* v. *Rundle*, *supra*, Mr. Chief Justice Waite said:

> "Every corporation necessarily carries with it its charter wherever it goes, for that is the law of its existence. It may be restricted in the use of some of its powers while doing business away from its corporate home, but every person who deals with it everywhere is bound to take notice of the provisions which have been made in its charter for the management and control of its affairs both in life and after dissolution."

And it is to be remembered that the case at bar is not merely the want of power through silence of the legislature, but one where the act done was positively prohibited.

It must be remembered that prior to the signing of the contract of April 16, 1891, the Legislature of the State of New York had enacted the law approved June 7, 1890, quoted *supra*, but which did not go into effect until May 1, 1891, fifteen days after this contract had been signed. It is to be remembered, also, that the law was in effect prior to the execution of the contract by either party.

Being thus prohibited by the statute, even if we should refer alone to the Act of 1890, and executory, the case is within the well-known principle that a legal impossibility occasioned by the passage or a statute rendering the act illegal will, by the courts of this country, in furtherance of the local public policy, be a sufficient excuse for non-performance.

Bailey v. *DeCrespigney*, L. R. 4 Q. B., 180.
2 Shuler on Personal Property, 287.
Benjamin on Sales, 571.
Campbell on Sales, 315.
Newby v. *Sharp*, L. R. 8 Ch. Div., 39.

This proposition is saved by the assignments of

error numbered 7 (R. 466) and 22 (R. 470), referring to the fifth proposition of law (R. 469).

It thus appears that we have not here the simple case of want of power because we are unable to put our finger upon a legislative act authorizing the purchase of the stock, but we have a case where, by two acts of the legislatures of the state to which the corporation owes its existence, the particular act which the court is asked to enforce was prohibited.

The contract to increase the capital stock of the De La Vergne Company is ultra vires and void.

Section 3 of the articles of incorporation of the De La Vergne Company is as follows:

> "The capital stock of said Company shall be three hundred fifty thousand dollars, which shall be divided into thirty-five hundred shares of one hundred dollars each."

Where the charter has definitely fixed the capital at a certain sum, a corporation has no implied authority to alter the amount of its capital stock. Unless expressly authorized, a corporation can neither increase nor diminish the number or value of its shares.

I Morawetz on Corporations, Sec. 434.

N. Y. & New Haven R. R. Co. v. *Schuyler*, 34 N. Y., 30, is a case in which the right of a corporation to increase its capital by increasing the number of its shares is discussed. We quote from the opinion of the learned court:

> "A corporation, with a fixed capital, divided into a fixed number of shares, can have no powers of its own volition, or by any act of its officers or agents, to enlarge its capital or increase the number of shares into which it is divided. The supreme legislative power of the state can alone confer that authority, and remove or consent to the removal of restrictions

> which are part of the fundamental law of the corporate being; and hence, every attempt of the corporation to exert such power, before it is conferred by any direct and express action of its officers, is void."

In *Railway Co.* v. *Allerton*, 18 Wall., 235, Justice Bradley said:

> "A corporation, like a partnership, is an association of natural persons who contribute a joint capital for a common purpose; and although the shares may be assigned to new individuals in perpetual succession, yet the number of shares and amount of capital cannot be increased, except in the manner expressly authorized by the charter or articles of association. . . . Changes in the purpose and object of an association, or in the extent of its constituency or membership, involving the amount of its capital stock, are necessarily fundamental in their character, and cannot, on general principles, be made without express or implied consent of its members."

Scovill v. *Thayer*, 105 U. S., 143, is to the same effect, and cites with approval both the Schuyler and Allerton cases.

No consent, express or implied, to increase the capital to effect this purchase was ever given by the shareholders of the De La Vergne Company.

The contention has been made that there was no agreement to increase the capital stock. In view of the fact that the contract recited that the then capital stock was $350,000 and the stock must be increased to $2,000,000 or a new corporation formed to comply with the contract, and in view of the fact that the capital stock was actually increased, it is not thought that this suggestion needs any attention.

III.

The petitioner was entitled in the court below to a special finding upon the issue of ultra vires raised by its sixth, seventh and eighth pleas (R. 22-24), and the court having refused to find upon this issue, the judgment is void.

It is thought that this principle is too well established to need argument. The court was silent upon many issues raised by the pleadings, and concerning which evidence was adduced, and notwithstanding the fact that he was requested to find specially upon each and every one of these issues. These refusals of the court to find upon the facts thus in issue, and concerning which testimony was adduced, were properly preserved and assigned for error in the Circuit Court of Appeals. They are not discussed at length here, as it is supposed that the principle applying to the one question upon which the judges of the Circuit Court of Appeals divided would apply to all of the other issues in the case concerning which there has been no finding. Upon the question of *ultra vires*, inasmuch as there was no finding by the trial court, and an equal division of opinion in the Court of Appeals, it appears there has been no trial whatever, and such an extraordinary situation is presented as to require the exercise of the jurisdiction of this court.

It is therefore submitted that the writ of *certiorari* should be issued as prayed for.

Respectfully submitted,

CHARLES H. ALDRICH,
FREDERICK W. LEHMANN,
CHARLES NAGLE,
Attorneys for Petitioner.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1898.

No. 240.

THE DE LA VERGNE REFRIGERATING MACHINE COMPANY,

Petitioner,

vs.

THE GERMAN SAVINGS INSTITUTION ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR PETITIONER.

Statement of Facts.

This cause, as its title indicates, was brought to this court by *certiorari* to the United States Circuit Court of Appeals for the Eighth Circuit. The facts of the case are as follows:

In July, 1892, eight actions in foreign attachment were brought in the Circuit Court of the City of St. Louis against The De La Vergne Refrigerating Machine Company and John C. De La Vergne, the plaintiffs demand-

ing, in the aggregate, the sum of one hundred thousand dollars ($100,000). (R. 2.) Certain personal property was levied upon (R. 11), a forthcoming bond given therefor (R. 14), and afterwards the several actions were removed to the United States Circuit Court for the Eastern Division of the Eastern District of Missouri upon the joint petition of the defendants. In that court the several actions were consolidated and submitted upon an agreed statement of facts (R. 38-51), resulting in a judgment for the defendants. Writs of error were taken to the United States Court of Appeals, and the judgment of the court below reversed and the cause remanded, with directions to grant a new trial. (36 U. S. App., 184.) In the court below, amended answers were filed (R. 18-22), much testimony taken, and the cause submitted to the court without the intervention of a jury, resulting in a judgment for $126,849.96 (R. 31-32) in favor of the plaintiffs, from which judgment a writ of error was prosecuted by The De La Vergne Refrigerating Machine Company, one of the defendants. John C. De La Vergne, the other defendant, died on the 12th day of May, 1896, and his death was suggested to the court on the 5th day of November, A. D. 1896, at which time William C. Richardson, Public Administrator of the City of St. Louis, entered his appearance and his consent that the actions be revived against John C. De La Vergne (R. 23), and an order was entered reviving each of said actions. (R. 24.) The right of the Public Administrator thus to represent the estate of John C. De La Vergne is one of the questions to which the attention of the court will be invited, and it will be contended that the court erred in permitting him to be joined with the surviving defendant.

As appears in the declaration, the controversy in these actions arose through an alleged breach on the part of the

defendants of a contract purporting to be entered into between the plaintiffs and defendants, bearing date the 16th day of April, 1891. (R. 39-43.) As shown by this contract, the Consolidated Ice Machine Company, a corporation organized under the laws of the State of Illinois, and engaged in the manufacture of refrigerating machinery and appliances, had become insolvent, and on the 14th day of October, 1890, made an assignment for the benefit of its creditors to R. E. Jenkins, who, at the date of the contract, was engaged in winding up its affairs. The assignment, both by operation of law and in express terms, included all of the property of the insolvent company, including its good-will. The plaintiffs were stockholders in this insolvent company, and represented to John C. De La Vergne, the president of the De La Vergne Company, that the assets exceeded in value the liabilities of the company; and he, without authority, either of the stockholders or directors, on the part of the corporation of which he was president and principal stockholder, and without any action ever having been taken, either before or after the execution of this contract, ratifying or confirming it (R. 188, 203, 225), entered into an agreement by which he was to purchase the stock of the plaintiffs in this insolvent company, increase the capital stock of his own company from three hundred and fifty thousand dollars ($350,000) to two million dollars ($2,000,000), (this increase to be effected either under the laws of the State of New York or by the organization of a new company under the laws of the State of New Jersey) and pay (R. 41-42) the plaintiffs an amount of the capital stock of the reorganized De La Vergne Company equal to the amount of the capital stock which they then held in the insolvent company.

By the first clause of the agreement, after the recitals,

the Consolidated Ice Machine Company and its stockholders covenanted with the defendants to sell and convey unto the party of the third part (De La Vergne) all their right, title and interest in and to the assets of the Consolidated Ice Machine Company, subject to the payments of its obligations and subject to the custody thereof in the legal custodian, R. E. Jenkins, assignee as aforesaid.

By the fourth clause the shareholders agreed, within ten days from the date of the agreement, to assign to John C. De La Vergne, for the benefit of The De La Vergne Refrigerating Machine Company, all the stock of the insolvent company which had been issued which the plaintiffs owned or controlled.

By the fifth clause the stockholders in the Consolidated Ice Machine Company covenanted to accept, in lieu of stock in the reorganized De La Vergne Company, or its successor, the sum of one hundred thousand dollars ($100,000) in cash, *at the option of John C. De La Vergne.*

To the petition setting out this agreement the defendants amended their answer before the last hearing. The answer as amended alleges that neither of the defendants ever received any of the consideration moving under the contract; that none of the assets, including the good-will of the Consolidated Company, ever came into the possession of either of the defendants, but that the same were transferred to the assignee and by him sold in the regular course of the administration of his trust to Knight and Butz, trustees, under a certain trust agreement between them and a large number of the creditors of the Consolidated Company (several of the plaintiffs, as will hereafter appear, were creditors of the Consolidated Company and were parties to this agreement); that John C. De La Vergne was never authorized by The De La Vergne Refrigerating Machine Company in its behalf to enter into

the contract upon which these actions are based; that the said company never ratified the said agreement, but rejected it: that on or about the 12th day of September, 1891, both of the defendants rejected the said contract, and that the said rejection was acquiesced in by the plaintiffs; that the plaintiffs did not perform the covenants of their agreement, but engaged in the manufacture of ice-making machinery; that they did not transfer the stock in accordance with the agreement; that the plaintiffs abandoned the contract; that the contract is *ultra vires* both as to the De La Vergne Company and the Consolidated Company; and that the contract is against public policy, and therefore void.

There was an attempt to deliver the stock, but it was practically conceded on the trial of the case, and was taken for granted by the court in its opinion (36 U. S. App., 184) that one hundred eighty-five (185) shares (stated in the opinion, 215), which were held by Lingenfelder and Rassieur as executors or trustees, were never legally assigned to De La Vergne, because the assignments made and delivered on April 26th, 1891, were not authorized by any order of the Probate Court.

The court, in its opinion, was very severe in its strictures upon the defendant company, assuming that it had received the assets of the Consolidated Ice Machine Company and the good-will of its business, benefited by the suppression of the competition of that company, and obtained legal control of the suppressed corporation, and after obtaining the benefits of the contract had failed and refused to pay the agreed price therefor, on the technical ground that less than one-fourth of the stock of the corporation that had conveyed away all of its assets and the good-will of its business had been imperfectly assigned. The court said that there was no evidence in the record

that had any substantial merit, and it was exceedingly difficult to see how any failure to assign this small minority of the stock could result in any injury to the defendant, and proceeded:

> "After the conveyance and covenant of April 16, 1891, was executed and delivered, the corporation was nothing but an empty shell. All its valuable rights and property had been vested in the De La Vergne Company, and the legal control of the shell itself was given to De La Vergne by the valid assignment of a majority of the stock of the corporation. These defendants cannot retain these benefits and thus make $100,000 for themselves, and throw a loss of $100,000 on the stockholders of this corporation, because they technically failed to perform their contract in the slight and immaterial particular that they did not legally assign a small minority of this stock." (36 U. S. App., 195.)
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> . . . . . .
>
> "Further, an offer to return them on September 12, 1891, if sufficient in form, would have been an idle ceremony. The defendants had undoubtedly then derived all the benefits of a performance of the contract by the Consolidated Company and its stockholders that they could ever derive. They still held the right to its assets subject to its debts, the good will of its business, and the covenant of its stockholders which suppressed its competition. No doubt, they had secured its customers and destroyed all possible competition. The return of the stockholders of the control over the empty shell of their corporation would have been a useless act. A merchant cannot, by offering to return the empty box, successfully defend an action for the purchase price of a box of goods, on the ground that the box was defective, when he has received and sold the goods." (36 U. S. App., 196.)

In interpreting the contract the court further said:

> "The rights and benefits which the defendants were to receive from this contract were, the right of the

> Consolidated Company to its assets, subject to the payment of its debts; the good will of its business, which had been established for six years; the suppression of the competition of that company and its stockholders, and the legal control of the suppressed corporation. . . . They received, retained, and had the benefit of all these rights and interests." (36 U. S. App., 194.)

When this decision was announced the appellants moved in the Court of Appeals that the order of reversal granting a new trial be modified, and that the reversal be with directions to enter judgment in favor of the several plaintiffs. This was refused, and the action stood for a new trial. Amended answers were filed. The sixth, seventh and eighth paragraphs of answer raised the issue distinctly that the contract was *ultra vires* of both the De La Vergne Refrigerating Machine Company and the Consolidated Ice Machine Company under the laws of their respective charter states. (R. 18-22.) Much testimony was taken, the most of which has no bearing upon the particular questions now presented to this court. It is sufficient to say that the inference of the Court of Appeals that the De La Vergne Company profited by the contract, and the harsh criticisms of its conduct indulged in by the court, were shown to be wholly unfounded. Mr. Knight, who represented the majority of the creditors in the assignment proceedings, testified that the De La Vergne Company never received any of the assets (R. 92); Mr. Jenkins, the assignee, made the same statement (R. 101); Mr. Bender, the manager of the De La Vergne Company, testified to the same effect (R. 179); Louis De La Vergne also (R. 188-189); Louis Barron, assistant manager, also (R. 206); also Charles H. Cone, the former secretary (R. 225). There is also the affirmative proof in the record (R. 391-392), and it was found by the court (R. 391) that on May 4, 1891,

only eighteen days after the date of the contract, and before the date fixed therein for its execution, the court entered an order to sell all the assets of the insolvent company, and they were subsequently sold to other than the defendants. (R. 392.)

Instead of being a case where the petitioner had received value, as originally supposed by the Court of Appeals, the record presents a case where a large recovery was sought for the confessedly partial delivery (36 U. S. App., 194) of stock in an insolvent corporation, forbidden by its charter to have an indebtedness beyond its capital stock, and yet shown to have been indebted to more than five times its valid stock, if we are to believe the recitals of the contract of April 16, 1891, that its stock was $100,000. The hardship and wrong was wholly on the other side. There was not a scintilla of evidence to the contrary.

The case was again submitted to the court without the intervention of a jury, by stipulation in writing waiving a jury, and the court was requested to find the facts specially, together with conclusions of law therefrom.

The requested findings of fact submitted by the defendants are found in the Record (348-383). The propositions of law submitted by the defendant are also set out in the Record (383-384). The court found the facts specially. (R. 385-407.)

It will be noticed that the first request for finding submitted by the defendant company was as follows:

> "I.
>
> "The De La Vergne Refrigerating Machine Company is, and was at the time of the commencement of these actions, a corporation organized under the laws of the State of New York governing the organization of manufacturing corporations enacted on the 17th day of February, 1848, entitled 'An Act to authorize the formation of corporations for manufac-

turing, mining, mechanical or chemical purposes,' and which laws, in and by the terms thereof, provide that 'it shall not be lawful for such company to use any of their funds in the purchase of any stock in any other corporation;' and said corporation, during the year 1890 and prior and subsequent thereto, was engaged in the business of manufacturing and selling refrigerating machinery, having its principal office and place of business at the foot of 138th Street in the City and State of New York." (R. 348-349.)

The court found upon this point:

"I.

"The De La Vergne Refrigerating Machine Company is, and was at the time of the commencement of these actions, a corporation organized under the laws of the State of New York governing the organization of manufacturing corporations enacted on the 17th day of February, 1848, entitled 'An Act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes,' and acts supplemental or amendatory thereof." (R. 385-386.)

The difference consists merely in the failure to find as a fact the prohibitory language quoted from the laws of the State of New York, which under some circumstances would not be material, as the court might take judicial notice thereof and administer relief accordingly. It is submitted, however, that here the strictness applying to a special verdict was requisite, and that the parties were entitled to a finding upon every material issue in the case. The defendant company asked the court to hold as a conclusion of law:

"The stock of the Consolidated Company was a part of the consideration for the promise of the De La Vergne Company to pay $100,000 in its own stock, or in cash, and the consideration being indivisible, and being illegal so far as the stock was concerned, the contract is illegal and void." (R. 384.)

The court found nothing upon this subject, and thus it happened that the findings were silent upon issues distinctly raised by the pleadings and upon which requests as to fact and law had been clearly made. There was no trial upon these issues. The questions were properly preserved by exceptions (R. 407-409), bill of exceptions, assignment of error. (R. 428-433.)

A writ of error was taken to the Court of Appeals; there was a summons in severance (R. 434-435), where the cause was argued and submitted to Judges Thayer and Sanborn, who handed down the following *per curiam* opinion:

> "PER CURIAM. The judges are divided in opinion upon the question whether or not the contract which is the basis of this action was *ultra vires* the De La Vergne Refrigerating Machine Company, and are of opinion that the other questions presented should be determined in favor of the defendants in error. The judgment below is therefore affirmed by a divided court."

It has thus come about that, although the defendant company, by proper pleading and evidence, has sought to defend itself against this contract as prohibited by the laws of the state to which it owes its existence, yet it has been unable to obtain the opinion of any court thereon—the trial court, though making special findings of fact, choosing to remain silent upon this subject, and the Court of Appeals being equally divided thereon.

It was doubtless owing to this extraordinary condition of affairs that the two judges composing the Court of Appeals suggested that an application be made to this court for a writ of *certiorari*, that the issue might be determined and the party not mulcted in a large sum without having its principal defense passed upon by any court.

We feel that there are other manifest errors in the rec-

ord that should receive the benefit of the judgment of this court. For example, the defendant John C. De La Vergne died testate after the action of the Court of Appeals reversing the first judgment and before any evidence was taken. He was not represented in the taking of the testimony. He was represented at the trial by William C. Richardson, Public Administrator of the City of St. Louis, notwithstanding the fact that the defendant company offered to show that he had no estate in the State of Missouri (R. 36, 37), and requested the court to find his death and that his estate was represented by W. C. Richardson solely in his capacity as such public administrator. (R. 349.) The court below finds a judgment against such administrator, *notwithstanding the fact that in its finding of facts it does not find that John C. De La Vergne is dead.* (R. 385-407).

Assignment of Errors.

It is assumed that (R. 413-433) when a cause is brought to this court by *certiorari* the case stands as in the court below, and that the errors assigned upon appeal are to be deemed assigned in this court. We therefore reprint here the assignment of errors on appeal from the Circuit Court to the Court of Appeals, omitting therefrom documents set out in such assignment, which are elsewhere found in the record, thus seeking to avoid needless repetition and expense, and also omitting the assignments which we do not now care to urge upon the attention of the court.

The assignments thus insisted upon are as follows: The court erred—

> "1. In overruling the motion of this defendant to dismiss this cause as to William C. Richardson, public administrator, in charge of the estate of John C. De La Vergne, deceased; to which action of the Court the

said defendant then and there duly excepted." (R. 413.)

"3. And the Court erred in this: That the plaintiffs offered evidence showing the election and qualification of Wm. C. Richardson as public administrator for the city of St. Louis, Missouri, for the term of four years beginning December 12th, A. D. 1892; to which evidence so offered by the plaintiffs the De La Vergne Refrigerating Machine Co. objected on the grounds that it was immaterial and irrelevant in that the public administrator has no standing as a party in this cause; which objection was, by the court, overruled; to which ruling of the Court the defendant's counsel then and there duly excepted." (R. 427.)

"4. And the said Court upon the trial of said cause, committed error in this: That the plaintiffs offered in evidence the notice given by said William C. Richardson as public administrator, on the 13th day of March, A. D. 1896, to the effect that he had taken charge of the estate of John C. De La Vergne, deceased, which notice is in words and figures as follows, to-wit:

"'STATE OF MISSOURI,

"'CITY OF ST. LOUIS, ss.

"'To the Hon. LEO RASSIEUR,

"'Judge of the Probate Court of the City of St.

"'Louis:

"'Notice is hereby given to creditors and all other persons interested in the estate of John C. De La Vergne, late of the City of St. Louis, deceased, that I, the undersigned, public administrator within and for the city aforesaid, have this day taken charge of said estate for the purpose of administering the same.

"'Given under my hand this 13th day of May, A. D. 1896.

"'WM. C. RICHARDSON,

"'Public Administrator.'

"The above notice bears the following endorsement on the back thereof:

"'Recorded in book of Pub. Admr. Notices on page 418. Filed May 13th, 1896. Jos. A. Wherry, Clerk. By J. W. Gutting, D. C.'

"To which offer the De La Vergne Refrigerating Machine Co. objected on the grounds that the same was immaterial and incompetent, because the public administrator has no standing as a party in this cause, and because the statute assuming to authorize the public administrator to act as such in this cause was unconstitutional; which objection was, by the Court, overruled. To which ruling of the Court, the defendant, the De La Vergne Refrigerating Machine Co. then and there duly excepted." (R. 427-428.)

"4½. And the said Court committed error in this: That upon the trial of said cause, it was admitted upon the record by the De La Vergne Refrigerating Machine Company, that, for the purpose of releasing certain attachments made at the time these actions were instituted, John C. De La Vergne, since deceased, deposited with Adolphus Busch, a resident of the city of St. Louis and State of Missouri, certain stocks in the De La Vergne Refrigerating Machine Company belonging to said John C. De La Vergne, and that the said certificates of stock are yet held and retained by said Adolphus Busch, in St. Louis. And, in that connection, the said De La Vergne Refrigerating Machine Company offered to show by Wm. C. Richardson, public administrator, that no property of any kind or description belonging to John C. De La Vergne, deceased, had come into his possession or control; and, that the only property of John C. De La Vergne, deceased, if any, within the State of Missouri at the time of his death, or at the present time, were the certificates referred to; which certificates were endorsed by said John C. De La Vergne, in blank. To which proof so offered by the said defendant, the plaintiffs object; which objection was, by the Court, sustained; to which ruling of the Court, the said defendant then and there duly excepted." (R. 428.)

"5. That the Court committed error in finding as a fact that the plaintiffs have not, nor have any of them since entering into the contract of April 16th, 1891, abandoned the same or acquiesced in any abandonment of rescission thereof; to which finding of the Court, the defendant, the De La Vergne Re-

frigerating Machine Co. then and there duly excepted." (R. 428.)

"6. And the said Court erred in its finding of fact that the plaintiffs have not, nor have any of them, since April 16th, 1891, violated the terms or provisions of their said contract of that date, by which they bound themselves not to enter into or become connected with, the sale of refrigerating or ice-making machines; to which finding of the Court, the defendant, the De La Vergne Refrigerating Machine Co. then and there duly excepted." (R. 428-429.)

"7. And the said Court erred in failing to find as requested by the defendant, the De La Vergne Refrigerating Machine Co., in the first proposition of fact requested by it, that the laws of the State of New York, under which the defendant, the De La Vergne Refrigerating Machine Co., was incorporated, provide: 'That it shall not be lawful for such company to use any of their funds in the purchase of stock in any other corporation.' To which action of the Court refusing to so find, the said defendant then and there duly excepted." (R. 429.)

"8. And the Court erred in this: That it failed to find the second proposition of fact requested by said defendant, the De La Vergne Refrigerating Machine Co., as follows:

"'That the president and principal stockholder of said corporation, in the years 1890 and 1891, was one John C. De La Vergne, who was made originally a defendant in these actions and was served with process and had appeared herein; that said John C. De La Vergne died testate on May 12th, 1896, in the city of New York and State of New York, where the executors appointed under his will are engaged in the administration of his estate; that said executors have never appeared in these actions, or any of them, nor has any *scire facias* or other process been issued in said actions, notifying such executors so to appear.'

"To which action of the Court in failing and refusing to find, the defendant, the De La Vergne Re-

frigerating Machine Co. then and there duly excepted." (R. 429.)

"9. And the Court committed error in this: That it failed to find, as requested by the said defendant, its third proposition of fact, as follows:

"'That the said John C. De La Vergne's estate is represented in these actions by W. C. Richardson, who is the duly qualified and acting public administrator under the laws of the State of Missouri, and appears as such representative in these actions solely in his capacity as such public administrator.'

"To which action of the Court in failing and refusing to so find, as requested, the said defendant then and there duly excepted." (R. 429.)

"10. And the Court erred in this: That it failed to find as requested by said defendant in its seventh proposition of fact that the said contract of April 16th, 1891, was never authorized by the directors and stockholders of the De La Vergne Refrigerating Machine Co.; to which failure and refusal of the Court to so find, the defendant then and there duly excepted." (R. 429.)

"13. And the said Court erred in this: That it refused to find the twelfth proposition of fact requested by said defendant; to which failure and refusal of the Court to so find as requested, the said defendant then and there duly excepted." (R. 430). Which said twelfth proposition of fact was as follows:

"'XII. That in the meantime, John Featherstone's Sons, who had been doing all that was in their power to prevent John C. De La Vergne purchasing the claims of creditors against said insolvent, and who was represented in such efforts by Clarence A. Knight, Esq., an attorney and counsel of the bar of the State of Illinois, joined with certain other creditors in a plan to form a new corporation to purchase the assets under said order of sale, and engage in the business of manufacturing ice machinery; or, in the event that such a plan could not be carried through, then to hold such assets and dispose of the same on the most favorable terms possible; and to that end entered into a so-called trust agreement on

the 9th day of October, 1891, a copy of which trust agreement marked "Exhibit I," is filed herewith and made a part thereof. That this trust (agreeing) more than a majority of the entire indebtedness of said Consolidated Ice Machine Company, including among others, The German Savings Institution, F. Widmann, Leo Rassieur and Jacob W. Skinkle, who are plaintiffs in these consolidated causes, and at the same time Leo Rassieur was the agent and representative, in his personal or professional capacity, of all the other plaintiffs in these consolidated causes. That by the terms of this trust agreement, the same Clarence A. Knight and Otto C. Butz were constituted trustees for the creditors so signing the agreement, as under the terms and with the powers set forth in said trust agreement.'" (R. 352-353.)

"14. And the said court erred in this: That it refused to find the fifteenth proposition of fact requested by said defendant; to which failure and refusal of the Court to so find, as requested, the said defendant then and there duly excepted." (R. 430.)

"Which said fifteenth proposition of fact is as follows:

"'XV. That the creditors so purchasing the property, and their trustees, did not avail themselves of the right contained in the trust agreement to organize a new company and prosecute the business of said insolvent, but, on the contrary, seem to have abandoned that project, and on the 30th day of January, 1892, made a conditional sale of said assets to John Featherstone's Sons, by which the title to said assets, and of all ice machinery, or parts of machines, to be sold by John Featherstone's Sons until certain payments in the agreement of sale should be made, was to remain in and be done in the name of the said trustees. A copy of said agreement, marked "Exhibit K," is filed herewith and made a part thereof.'" (R. 353.) (Exhibit K—see Record, p. 380.)

"15. And the said Court erred in this: That it refused to find the sixteenth proposition of fact requested by said defendant; to which failure and refusal of the Court to so find, as requested, the said defendant then and there duly excepted." (R. 430.)

"Which said sixteenth proposition of fact is as follows:

"'XVI. That the business was so prosecuted, under the terms of said agreement, from the date of said sale (January 30th, 1892), until the 10th day of May, 1892, when the said Featherstone's Sons availed themselves of the option contained in said agreement to make an earlier payment and receive an absolute title of the property.'" (R. 353.)

"16. And the Court erred in this: That it refused to find the seventeenth proposition of fact requested by said defendant, as contained in its request for finding of facts, which is as follows:

"'That neither John C. De La Vergne nor the De La Vergne Refrigerating Machine Company ever acquired or received any part of the assets of any kind or description of said Consolidated Ice Machine Company, and that the only delivery of any kind or description that was ever made by the parties of the first and second parts to the contract of April 16th, 1891, was of certain shares of stock owned by the several parties of the second part to said contract, and delivered as more particularly described in the next paragraph and the document therein referred to.' (R. 354.)

the said document being the agreed statement of facts hereinbefore set forth; to which failure and refusal of the Court to so find as requested, the said defendant then and there duly excepted." (R. 430.)

"17. And the said Court committed error in this: That it refused to consider or pass upon the ten propositions of law requested by the said defendant, or upon any of the same; to which action of the Court in so refusing to pass upon the propositions of law requested by defendant, or upon any of the same, the defendant then and there duly excepted. The said ten propositions of law are as follows (R. 430):

"'I.

"'On April 16th, 1891, the date of the contract upon which these actions are brought, the Consolidated Ice Machine Company, insolvent, had no assets, legal or equitable, which it could convey, and its stockholders deriving their interest as they must

through the corporation, had no interest, legal or equitable, in the assets, including goodwill of the corporation, which was the subject of conveyance,—nothing passed, therefore, to the defendants, or either of them, through the pretended sale of the date named, except the certificates of stock.

"'II.

"'The plaintiffs having at the date of the pretended conveyance no present title to the assets of the Consolidated Ice Machine Company, the case was within the well-known rule which makes such a sale void.

"'III.

"'The assets of the Consolidated Company, insolvent, being in the hands of an assignee under the assignment laws of the State of Illinois and in process of administration, the stock owned by the respective plaintiffs was the only thing attempted to be delivered under the contract, and was the only thing capable of passing by such contract, and must therefore be deemed the object of the contract.

"'IV.

"'The plaintiffs, as stockholders in the Consolidated Ice Machine Company, an insolvent corporation, which had made a deed of all its property to an assignee under the insolvent laws of the State of Illinois, could not thereafter, and while such assignee was engaged in the administration of the insolvent's estate, by their joint action convey or transfer any interest in the property or assets of the corporation itself, and therefore the contract must be held to have for its real purpose the transfer of the stock in the corporation which alone was capable of being the subject-matter of transfer.

"'V.

"'The stock of the Consolidated Company was a part of the consideration for the promise of the De La Vergne Company to pay $100,000 in its own stock, or in cash, and the consideration being indivisible, and being illegal so far as the stock was concerned, the contract is illegal and void.

"'VI.

"'If the contract be considered as a sale of the assets of the Consolidated Ice Machine Company, including its good-will, for stock in the De La Vergne Refrigerating Machine Company, and not a sale of stock, then it was *ultra vires* as to the vendor company.

"'VII.

"'The contract was joint and not several, and therefore the actions are improperly brought.

"'VIII.

"'The plaintiffs abandoned the contract upon which the action is brought.

"'IX.

"'The contract for the delivery of the stock was an entire contract; such delivery was a condition precedent to any action on the part of the plaintiffs; the plaintiffs failed to make a complete delivery; and therefore this action must fail.

"'X.

"'The contract to increase the capital stock of the De La Vergne Refrigerating Machine Company was *ultra vires* and void.'" (R. 431, 432.)

"18. And the said Court committed error in this: That it refused to define and declare the law to be, as requested by the said defendant in its first proposition of law; to which refusal of the Court, the said defendant then and there duly excepted." (R. 432.)

"19. And the said Court committed error in this: That it refused to define and declare the law to be, as requested by the said defendant in its second proposition of law; to which refusal of the Court, the said defendant then and there duly excepted." (R. 432.)

"20. And the said Court committed erorr in this: That it refused to define and declare the law to be, as requested by the said defendant in its third proposition of law; to which refusal of the

Court, the said defendant then and there duly excepted." (R. 432.)

"21. And the said Court committed error in this: That it refused to define and declare the law to be, as requested by the said defendant in its fourth proposition of law; to which refusal of the Court, the said defendant then and there duly excepted." (R. 432.)

"22. And the said Court committed error in this: That it refused to define and declare the law to be, as requested by the said defendant in its fifth proposition of law; to which refusal of the Court, the said defendant then and there duly excepted." (R. 432.)

"23. And the said Court committed error in this: That it refused to define and declare the law to be, as requested by the said defendant in its sixth proposition of law; to which refusal of the Court, the said defendant then and there duly excepted." (R. 432.)

"24. And the said Court committed error in this: That it refused to define and declare the law to be, as requested by the said defendant in its seventh proposition of law; to which refusal of the Court, the said defendant then and there duly excepted." (R. 432.)

"25. And the said Court committed error in this: That it refused to define and declare the law to be, as requested by the said defendant in its eighth proposition of law; to which refusal of the Court, the said defendant then and there duly excepted." (R. 432.)

"26. And the said Court committed error in this: That it refused to define and declare the law to be, as requested by the said defendant in its ninth proposition of law; to which refusal of the Court, the said defendant then and there duly excepted." (R. 432.)

"27. And the said Court committed error in this: That it refused to define and declare the law to be, as requested by the said defendant in its tenth proposition of law; to which refusal of the Court,

the said defendant then and there duly excepted." (R. 432.)

"28. And the said Court committed error in entering judgment for the plaintiffs and against the said defendant for the sum of $126,849.96 and costs." (R. 432.)

"31. And the said Court committed error in overruling the said defendant's motion for a new trial." (R. 432.)

"32. And the said Court committed error in rendering judgment against W. C. Richardson, public administrator, etc." (R. 432.)

BRIEF.

I.

The assets of the Consolidated Company, insolvent, being in the hands of an assignee under the insolvent laws of Illinois and in due process of administration, the stock owned by the respective respondents was the only thing attempted to be delivered under the contract, and was the only thing capable of passing by such contract, and must, therefore, be deemed the subject of the contract.

Humphreys v. *McKissok*, 140 U. S., 304.
Smith v. *Hurd*, 12 Mete., 371, 385.
Railroad Co. v. *Howard*, 7 Wall., 392.
Whistler v. *Foster*, 14 C. B. (N. S.), 248.
Fawcett v. *Osborn*, 32 Ill., 411.
Burton v. *Curyea*, 40 Ill., 320.
Story on Sales (3rd Ed.), Secs. 188, 423.
Linn v. *Thornton*, 1 C. B., 379.
Huling v. *Cobell*, 9 W. Va., 522.
Low v. *Pew*, 108 Mass., 349.

That all the title of the Consolidated Ice Machine Company passed by the deed to the assignee on October 14, 1890, leaving no title, legal or equitable, in the insolvent company or its individual shareholders to which the contract of April 16, 1891, could attach.

Weber v. *Mick*, 131 Ill., 520, 533, 534.

Walker v. *Ross*, 150 Ill., 50.

Spindle v. *Shreve*, 111 U. S., 545.

As to the claim that the transfer of the stock was only incidental to the main purpose of the contract, which the respondents assert and one of the judges intimated was to convey the assets subject to the debts, and the stock was therefore only incidental as a means for further assurance of title, it is submitted that it was even then *a part* of the consideration for an indivisible promise, and being unlawful, the entire contract is void.

Bishop on Contracts, Sec. 74.

Widoe v. *Webb*, 20 Oh. St., 431.

Carleton v. *Woods*, 28 N. H., 290.

Peering v. *Chapman*, 22 Me., 488.

Ocean Ins. Co. v. *Polleys*, 13 Pet., 157, 164.

McBlair v. *Gibbes*, 17 How., 232.

Dent v. *Ferguson*, 132 U. S., 50, 64-66.

Armstrong v. *American Ex. Bank*, 133 U. S., 433, 469.

II.

The stock of the Consolidated Ice Machine Company was a part of the consideration for the promise of the De La Vergne Company to pay $100,000 in its own stock or in cash. The contract is ultra vires of the vendee company, and therefore illegal and void.

Laws of New York, 1848, Ch. 40, Sec. 8.

Id., 1890, Ch. 564, Sec. 40.

Boone, Law of Cor., Sec. 107.

Green's Brice Ultra Vires, p. 91, note *b*.

1 Morawetz Private Cor., Secs. 431, 433.

People v. *Chicago Gas Trust Co.*, 130 Ill., 268, 284.

Milbank v. *N. Y., L. E. & W. R. R. Co.*, 64 How. Pr., 20.

Talmage v. *Pell*, 7 N. Y., 328.

St. L., V. & T. H. R. Co. v. *T. H. & I. R. Co.*, 145 U. S., 393.

Central Transportation Co. v. *Pullman Car Co.*, 139 U. S., 24.

California Nat'l Bank v. *Kennedy*, 167 U. S., 362.

Marble Co. v. *Harvey*, 92 Tenn., 116.

Union Pacific Ry. Co. v. *Chicago, M. & St. P. Ry. Co.*, 163 U. S., 564.

Alexander v. *Cauldwell*, 83 N. Y., 480.

Davis v. *Old Colony R. R.*, 131 Mass., 258.

Applying to the act of 1890, supra, enacted before the contract upon which action was brought, but going into force fifteen days after it was signed, but before the delivery upon either side under the contract.

Baily v. *De Crespigney*, L. R. 4, Q. B., 180.

Newby v. *Sharp*, L. R., 8 Ch. Div., 39.

2 Schouler Personal Prop., 287.

Benjamin on Sales, 571.

Campbell on Sales, 315.

Applying to the contract to increase the capital stock of the De La Vergne Company.

1 Morawetz on Cor., Sec. 434.

N. Y. & N. H. R. R. Co. v. *Schuler*, 34 N. Y., 30.

Railway Co. v. *Allerton*, 18 Wall., 233.

Scovill v. *Thayer*, 105 U. S., 143.

III.

The petitioner was entitled in the court below to a special finding upon the issue of ultra vires raised by its sixth, seventh and eighth pleas (R. 22-24), and the court having refused to find upon this issue, the judgment is void.

Cannot go to other parts of record to help out the finding.

The E. A. Packer, 140 U. S., 360, 364, 365, bottom of page.

Special findings have same effect as special verdict by jury.

Saltonstall v. *Britwell*, 150 U. S., 417, 419.

Special verdict is bad unless it finds all the facts in issue.

Ft. Scott v. *Hickman*, 112 U. S., 150, 164.

Ward v. *Cochran*, 150 U. S., 597, 608.

IV.

The De La Vergne Company and John C. De La Vergne having incurred a liability (if any) growing out of the same transaction, William C. Richardson, the public administrator of John C. De La Vergne, who has died, cannot be joined with the De La Vergne Company, and the action of the court below in allowing such public administrator to represent the estate of John C. De La Vergne in said action, and rendering a judgment against said De La Vergne, so represented, and this defendant, was not authorized under Sec. 956, R. S. of the United States, and to give such effect to the appointment of the public administrator by the state court is in violation of the provisions of the fifth and fourteenth amendments to the Constitution of the United States.

Section 956, R. S. U. S.

Seaman v. *Slater*, 18 F. R., 185.

Ballance v. *Samuel*, 3 Scam., 380.

Eggleston v. *Buck*, 31 Ill., 254.

Eich v. *Severs*, 73 Ill., 194.

Moore v. *Rogers*, 19 Ill., 346.

Powell v. *Kettelle*, 1 Gil., 491.

Conover v. *Hill*, 76 Ill., 342.

1 Chitty on Pl., 50.

The prohibitions of the constitution extend to all the instrumentalities of the state.

Chi., Burlington & Quincy R. R. Co. v. *Chicago*, 166 U. S., 226, 233.

The evidence offered and excluded was not a collateral

attack upon the appointment or authority of the public administrator.

Insurance Co. v. *Lewis*, 97 U. S., 682.

Mut. Life Ins. Co. v. *Woodworth*, 111 U. S., 138.

The shares of stock in the New York corporation deposited with Mr. Busch by John C. De La Vergne, deceased, did not constitute assets upon which administration by the public administrator could be predicated.

Armour Bros. Banking Co. v. *St. Louis Nat'l Bank*, 113 Mo., 12; and cases there cited.

V.

The respondents abandoned the contract upon which the action is brought and violated its provisions.

VI.

The contract was joint and not several, and therefore the actions are improperly brought.

Rainey v. *Snizer*, 28 Mo., 310.

Farni v. *Tesson*, 1 Black, 309.

Keightley v. *Watson*, 3 Ex., 716.

Parsons on Con. (8th Ed.), pp. 14-17, Williston's notes; Id. (6th Ed.), star page 13.

17 Am. & Eng. Enc. of Law, 562.

Foley v. *Addinbrooke*, 3 Gale & D., 64.

Lucas v. *Beale*, 20 L. J. (U. S.), cp. 134.

Lockhart v. *Barnard*, 14 M. & W., 674.

Byrne v. *Fitzhugh*, 5 Tyr., 54; 1 C. M. & R., 613.

Hatsall v. *Griffith*, 4 Tyr., 487.

Petrie v. *Bury*, 3 B. & C., 353.

Southcote v. *Hoare*, 3 Taunt., 87.

Guidon v. *Robson*, 2 Camp., 302.

ARGUMENT.

I.

The assets of the Consolidated Company, insolvent, being in the hands of an assignee under the insolvent laws of Illinois and in due process of administration, the stock owned by the respective respondents was the only thing attempted to be delivered under the contract, and was the only thing capable of passing by such contract, and must, therefore, be deemed the subject of the contract.

Since the question of *ultra vires* was raised, the claim is put forward that there was no sale of stock by the respondents and no purchase of stock by the defendants below; that the sale was of the assets of the insolvent corporation theretofore conveyed by the corporation to the assignee, subject to the payment by the assignee of the debts, and that transfer of the stock was a mere incident collateral to the main purpose of the contract. This interpretation of the contract is not sustained by its language, or the situation and conduct of the parties, and, even if the contention were admitted, for the sake of argument, it would not avail the respondents, as they would still be compelled to admit that the transfer of the stock was *a part* of the consideration.

The court will notice the attempts made to fortify the theory of the respondents by the extraordinary efforts to italicize or emphasize, with the printer's assistance, certain words and sentences of the contract of April 16, 1891. This first appeared in the printed record in the Court of Appeals, and has been properly followed by the clerk in

this court. It is sufficient to say that there is no warrant for such emphasis in the contract as actually made. How the emphasis came to be added can only be surmised. It is not thought that the natural meaning or construction of the contract can be thus changed, and this statement is made rather as an explanation of what the parties did not do than as an accusation as to what any party has done. The possibility of accident, or the presence of errors through the printer's devil, may explain this singular emphasis.

The stock was the only property owned by the respondents. It was the only subject of attempted transfer. If we admit, for the purpose of argument, that upon the payment of the debts the title would revert, the reversion would be to the corporation--not to the shareholders. If an equity existed, it belonged to the corporation and not to the shareholders. If the corporation had anything to convey, the transfer would have been in the name of the corporation, by its proper officers thereunto duly authorized. If the other party to the contract failed to pay the consideration, the corporation, not the shareholders, either jointly or severally, must bring action to obtain redress.

All of the records of the Consolidated Ice Machine Company, from its organization to the date of the trial, are in the record, and it is affirmatively shown that neither the stockholders nor the directors ever authorized the contract sued upon, or afterwards ratified or confirmed it.

The idea that all the shareholders of a corporation may, by uniting in a contract or deed, transfer the property of a corporation, without corporate action, is a mistake. If corporate property was the subject of transfer in this case, it should have been applied to the payment of the debts, which the record shows are, after a wise and economical administration of the estate, yet unpaid to an amount ex-

ceeding $150,000. (R. 99.) Again, if corporate property was the subject of transfer, the consideration therefor could only be obtained by the plaintiffs in the several actions through the ownership of their several shares of stock, and the defendant company could acquire the property, if at all, in view of the previous conveyance to the assignee, only through the ownership of the stock. This made the stock, in any view of the case that it is possible to take, an essential element of the transfer.

It is thought that these several statements are abundantly sustained by the authorities.

The Supreme Court of Illinois, which court is, perhaps, the final judge of the extent and scope of the powers of corporations organized under the laws of that state, as was the Consolidated Ice Machine Company, and of the extent and scope of the powers of stockholders in such corporations, has held, quoting opinions of this court, that all the shareholders uniting cannot transfer the title to corporate property.

In *Sellers* v. *Greer*, 172 Ill., 549 (s. c., 40 L. R. A., 589), the court said:

> "It is true that Morris Sellers and Howard Greer owned all of the stock of the corporation except two shares, which belonged to their sons. But did this fact confer upon them, or either of them, the power to sell the corporate property? It is conceded that the patents and all the other property named in the contract in question belonged to the corporation Morris Sellers & Co., and the question presented is whether Morris Sellers and Howard Greer, two of the stockholders, without the consent or authority of the corporation Morris Sellers & Co., had the right to divide the corporate property between themselves, or to sell it, as was attempted to be done by the contract in question. A corporation is an artificial being created by law, clothed with certain powers. It acts through its board of directors and officers. Its prop-

erty is not subject to the control or disposition of its members or stockholders. They have no power to sell or encumber the corporate property. A reference to a few authorities will fully sustain what has been said.

"In 2 Cook, Stock & Stockholders, 3d ed. Sec. 709, it is said: 'The stockholders cannot enter into contracts with third persons. Contracts between the corporation and third persons must be entered into by the directors, and not by the stockholders. The corporation, in such matters, is represented by the former, and not by the latter. Such is one of the main objects of corporate existence. To the directors are given the management and formation of corporate contracts. The stockholders cannot, in meeting assembled, bind the corporation by their contracts in its behalf. Although one person owns a majority of the stock, or all of it, or all but two shares, he does not in consequence thereof acquire the right to act for the corporation, or as the corporation, independently of the directors. One person may own all the stock, and yet the existence, relations, and business methods of the corporation continue. A single stockholder cannot make a contract for and in the name of the corporation which shall have any binding force or validity, except by subsequent ratification or adoption in the regular manner.'

"In *Allemong* v. *Simmons*, 124 Ind. 199, it was attempted to hold a corporation liable on a contract made by one Crawford, who was a director and owner of five-sixths of the stock of the corporation. In disposing of the question the court said: 'It is true, Crawford was one of the directors of the company, and held a majority of the stock, but the existence of these facts conferred upon him no power to make contracts for the corporation. It could only be bound by the action of its board of directory; the board could have conferred on Crawford this power, but there was no evidence that it had done so. Crawford, as one of the directors, had no more authority or power than any other director. The board consisted of five members; and three consituted a quorum, less than three could make no binding contract for the

corporation. . . . The contract which Simmons and Ayleshire executed with Crawford was the mere personal engagement of Crawford with the said parties.'

"In *Humphreys* v. *McKissock*, 140 U. S., 304, 35 L. ed. 473, the validity of the action of all the stockholders of a corporation in transferring its property without corporate action arose, and in disposing of the case the court said: 'Both the commissioner and the court, in confirming his report and entering the decree mentioned, seem to have confounded the ownership of stock in a corporation with ownership of its property. But nothing is more distinct than the two rights; the ownership of one confers no ownership of the other. The property of a corporation is not subject to the control of individual members, whether acting separately or jointly. They can neither encumber nor transfer that property, nor authorize others to do so. The corporation—the artificial being created—holds the property, and alone can mortgage or transfer it; and the corporation acts only through its officers, subject to the conditions prescribed by law. In *Smith* v. *Hurd*, 12 Met. 385, 46 Am. Dec. 690, the relations of stockholders to the rights and property of a banking corporation are stated with his usual clearness and precision by Chief Justice Shaw, speaking for the Supreme Court of Massachusetts, and the same doctrine applies to the relations of stockholders in all business corporations. Said the Chief Justice: 'The individual members of the corporation, whether they should all join, or each act severally, have no right or power to intermeddle with the property or concerns of the bank, or call any officer, agent, or servant to account, or discharge them from any liability. Should all the stockholders join in a power of attorney to any one, he could not take possession of any real or personal estate, any security or chose in action; could not collect a debt, or discharge a claim, or release damage arising from any default, simply because they are not the legal owners of the property, and damage done to such property is not an injury to them. Their rights and their powers are limited and well defined.'

"In this court, in *Hopkins* v. *Roseclare Lead Co.* 72 Ill. 373, the right of a stockholder of a corporation to transfer certain leases belonging to the corporation arose, and in disposing of the question the court said (p. 379): 'It is insisted that La Grave had no power to make the sale of the leases, to transfer the control of the suit, or to sell the 20 acres of land, as they were all owned by the company. He was but a stockholder, and as such had no power to make the sale. He, although owning the majority of the stock, could not act for the company unless specially authorized. He could, no doubt, control the action of the company by the election of its officers, but still the company could only act through its officers or by expressly delegating power to others, whether a stockholder or other persons.' See also *England* v. *Dearborn*, 141 Mass. 590; *Newton Mfg. Co.* v. *White*, 42 Ga. 148; *Russell* v. *M'Lellan*, 14 Pick. 63.

"From what has been said it is apparent that Morris Sellers, although he owned one-half of the capital stock of the corporation, had no right to sell the corporate property, and any contract he may have made would not be obligatory on the corporation. The corporation, Morris Sellers & Co., the owner of the letters patent and other property described in the contract, was not made a party to the bill, and no decree could have been obtained against it if it had been made a party, for the reason it never executed the contract. Nor did it ratify the contract after it was made, but, on the other hand, expressly refused to do so on application of Greer to its board of directors. The bill prayed that Sellers might be compelled to convey the letters patent named in the contract to Greer. He had no title, and hence could not make a conveyance, and any decree that might have been rendered would have been nugatory. In a bill for specific performance, the contract must be of such a character that the court is able to make an efficient decree and enforce it when made. 3 Pom. Eq. Jur. Sec. 1405."

As has been noted, and as is affirmatively shown in the record, neither the stockholders nor the directors author-

ized the transfer of the assets or equity therein, if such a thing existed, to John C. De La Vergne or the De La Vergne Refrigerating Machine Company. The officers had been directed to assign all the property of the corporation, including its good-will, to Robert E. Jenkins, as assignee, under the insolvent laws of the State of Illinois, and had done so. (R. 173-174.) To claim that having made the assignment by deed, after the assignee had entered into possession and was engaged in the administration of the estate, the corporation had any property to dispose of for the benefit of its shareholders and leave its creditors unpaid, is in the highest degree absurd. To assert that the shareholders may use the name of the corporation under such circumstances, and secure to themselves, and not for the corporation, one hundred thousand dollars, while leaving creditors of the corporation to the extent of one hundred and fifty thousand dollars unpaid, seems equally absurd; and to add to these propositions the further one that these shareholders did not sell any stock (although shares of stock were the only things which they attempted to deliver), but sold the property of the corporation, and are nevertheless entitled to recover the consideration promised, not in the name nor in the interest of the corporation, but in the several names and interest of the shareholders and in the proportion of such holdings, by separate actions, is to disregard such fundamental principles of legal rights and remedies that we are unable to understand how one of the learned judges below reached his conclusions as to the right of recovery.

"*Nemo dat quod non habet.*" This maxim expresses the principle that one who has no title cannot confer a title as expressed by Willis, J., in *Whistler* v. *Foster*, 14 C. B. (N. S.), 248.

The idea has been reiterated in the form: "No one can

sell a right when he himself has none to sell;" and it has been declared that this proposition is so self-evident that argument cannot elucidate or strengthen it.

14 Cent. Law J., 146.

> "The general rule of law, sanctioned by common sense, is that no man can, by his sale transfer to another the right of ownership in a thing wherein he himself has not the right of property."
>
> *Fawcett* v. *Osborn*, 32 Ill., 411.
>
> *Barton* v. *Curyea*, 40 Ill., 320.
>
> "The general rule is, that the subject of the sale must belong to the vendor, and that he can sell no more than the interest, which he legally possesses."
>
> Story on Sales (3rd Ed.), Sec. 188.
>
> "Again, if the vendor wholly fails to make a title to the vendee in an executory contract, the vendee may rescind the contract."
>
> Story on Sales (3rd Ed.), Sec. 423.

Tindal, C. J., in delivering the opinion of the court in *Linn* v. *Thornton*, 1 C. B., 379, said:

> "It is not a question whether a deed might not have been so framed as to have given the defendant a power of seizing the future personal goods of the plaintiff, as they should be acquired by him, and brought on the premises, in satisfaction of the debt, but the question arises before us on a plea which puts in issue the *property* in the goods, and nothing else: and it amounts to this, whether by law a deed of bargain and sale of goods can *pass the property* in goods which are not in existence, or, at all events, which *are not belonging to the grantor at the time of executing the deed.*" Held, in the negative.

In *Huling* v. *Cobell*, 9 W. Va., 522, it appeared that an agricultural society assigned for the benefit of its creditors the proceeds of a fair about to take place on its grounds. It was held that such an assignment was void as against the lien of an execution issuing before the payment of the pro-

ceeds to the creditors. Mr. Justice Green, in his opinion, discusses the general subject, and says the rule is *that a sale of property in which the vendor has no present interest is void.*

> "It is an elementary principle of the law of sales, that a man cannot grant personal property in which he has no interest or title. To be able to sell property, he must have a vested right in it at the time of the sale."
>
> *Low* v. *Pew,* 108 Mass., 349.

In *McGoon* v. *Ankeny,* 11 Ill., 558, it was held to be law that the real owner of personal property cannot sell his right or title in it to another while it is in the actual or adverse possession of one who claims title to it.

> "Hence, the general rule is stated to be, that a purchaser of property takes only such title as his seller has, and is authorized to transfer; that he acquires precisely the interest which his seller owns, and no other or greater."
>
> *Barnard* v. *Campbell,* 55 N. Y., 460.

If, after the payment of all debts, there should remain in the hands of the assignee any surplus of the proceeds of sales and collections, such surplus belongs to the assignor. But this right of the assignor to the surplus does not exist until all debts are paid. When they are paid, it is called into existence.

> Burrill on Assignments, 712.
>
> *Butler* v. *Thompson,* 4 Abb. N. C., 290.
>
> *Briggs* v. *Davis,* 21 N. Y., 574.
>
> *Sandmeyer* v. *Dakota F. & M. Co.* (S. Dak.), 50 N. W., 353.

Before debts are paid this right is uncertain, indefinite, a mere possibility. It cannot be determined until debts are paid, and until that time it is not known whether there will be a surplus or a deficit; no doubt this right to the

surplus, if any, is a valuable right, but it is held adversely. An assignment is made for the benefit of creditors, and until they are paid everything of value is vested in the assignee in trust for them. Such indefinite right as this resulting trust in favor of the assignor is not subject to sale by shareholders. It belonged to the assignor, which, in the present case, is the Consolidated Company.

The Illinois statutes respecting assignments, in so far as it provides for a discontinuance of proceedings, is as follows, viz.:

> "All proceedings under the Act of which this is amendatory, may be discontinued upon the assent, in writing, of *such debtor*, and a majority of his creditors in number and amount; and in such cases, all parties shall be remitted to the same rights and duties existing at the date of the assignment, except so far as such estate shall have already been administered and disposed of; and the court shall have power to make all needful orders to carry the foregoing provision into effect."
>
> Revised Statutes (Ill., 1897), "Assignments," Section 15.

Nothing could be done under this statute except by aid of the debtor, the Consolidated Company. The assent requisite is that of the debtor and a majority of the creditors in number and amount.

The De La Vergne Company did not by the contract become the debtor, for it expressly refused to assume liability for debts of the Consolidated Company. (Sixth article of contract, R. 42.) It had bargained for the stock of the company, and through this stock, and only through this stock, could it secure the assent in writing of the debtor.

So the contract, having in view the fact that the assent of the debtor is necessary to a discontinuance of the assignment proceedings, provides in its fourth clause that the stock shall be assigned as prescribed, "for the purpose

of placing the said party of the third part (the De La Vergne) *in complete control* of the assets of the party of the first part, subject to the legal rights of said assignee and the creditors of said party of the first part."

The stock was necessary not only to "complete control," but it was necessary to any control whatever.

Conceding that the Consolidated Company was an empty shell, in the sense that it was insolvent, and did not contemplate a resumption of business, the fact remains that the assets which had belonged to it could be reached only through it, and it could be reached only through its stock.

The stock of the Consolidated Company was then the vital element of the consideration to the De La Vergne Company, even though the value of this stock was to be realized through the acquisition by the De La Vergne of the former assets of the Consolidated Company.

Assume that the contract contained no provision for a sale of stock, and leave the contract one in form and in fact as the respondents say it is in essence, one for the sale of the former assets of the Consolidated, subject to the rights of the assignee and the creditors, and what would the petitioners receive by the contract?

The right to discontinue the assignment, a majority of the creditors in number and amount consenting, the only right of any kind in respect to its assets remaining to the Consolidated Company after the assignment, was not conveyed by the contract and could not be so conveyed.

No court would at the suit of the De La Vergne Company compel it to assent. The matter was one between it as a debtor and its creditors.

It seems clear, therefore, from the law of Illinois, and from the language of the contract, that this possibility of discontinuing the assignment by composition or other ar-

rangement with creditors was the one thing of possible value connected with the assets of the insolvent company. This and the corporate existence might be utilized for some purpose, but, and this is true as to both of them, *only through the stock.*

The conclusion is irresistible that the stock was a part of the consideration.

On the 1st day of December, 1891, Mr. Jenkins, as assignee of the Consolidated Company, sold to John Featherstone's Sons the good-will, machinery, patterns, etc. (R. 85.)

The bills and accounts receivable were collected by the assignee and by Knight and Butz, and distributed by them among the creditors.

There is, therefore, nothing that the petitioners received unless it be the shares of stock. It has been shown that these shares were not evidence of any present interest in property.

But let us assume that stock ownership in a corporation which has executed an absolute assignment under the insolvent law by which all its property and every *legal* and *equitable interest therein* is vested in the assignee means the same thing as stock ownership in a solvent running corporation. What is the situation then?

The certificates of stock were evidence of the ownership of a distributive share in the surplus after debts are paid.

> "A share of the capital stock merely gives the right to partake, according to the amount put into the fund, of the surplus profits of the corporation, and ultimately on the dissolution of it, of so much of the fund thus created as remains unimpaired and is not liable for debts of the corporation."
>
> Thompson, Commentaries on Law of Corporations, Sec. 1071.

This is a fundamental principle. It is not necessary to cite further authorities.

The assets lacked $150,000 of being sufficient to pay the debts of the Consolidated Company. (R. 99.) What is the value of a distributive share in a deficiency of $150,000?

It is idle to talk of the shares in the Consolidated Company being evidence of a distributive share in anything of value, at the time of the contract.

If the corporation was not insolvent, it was a fraud to assign.

Gardner v. *Commercial National Bank*, 95 Ill., 298.

But this assumption cannot be made; the title to all the assets passed to the assignee absolutely. Distributive ownership in the company is then impossible. The only thing of value that possibly did not pass to the assignee is the franchise, the right to be a corporation.

But all the title of the Consolidated Ice Machine Company passed by the deed of the assignee on October 14, 1890, leaving no title, legal or equitable, in the insolvent company or its individual shareholders, to which the contract of April 16, 1891, could attach.

By the agreed statement of facts, as well as by the express terms of the deed of assignment, there passed to the assignee all the property of the Consolidated Ice Machine Company wherever situated, including the patent rights, outstanding accounts "*and the good-will of its business.*" (R. 174.) This good-will was subsequently advertised for sale by the assignee, under the order of the court, together with $100,000 of the capital stock of the company not embraced in the sale to De La Vergne. (R. 138-139.) The assets and good-will were subsequently sold, likewise under the order of the court, to Clarence A. Knight and

Otto C. Butz, as trustees, for $309,000 of the claims against the estate, including a portion of the respondent's herein. (R. 144, 146.) Knight and Butz afterwards, under order of court, sold the assets so acquired, including the good-will, to John Featherstone's Sons; and subsequently, by formal deed, conveyances were made by these respective parties. (R. 82, 85.)

It is thus clearly shown by the record that the assumption of the learned court deciding this case (36 U. S., 184), that the De La Vergne Company acquired the good-will or any portion of the assets of this company at any time, is wholly erroneous, as by undisputed evidence in the case (R. 99) there remains $150,000 of the indebtedness of the company yet unpaid after the estate is fully administered.

In the absence of these express provisions of the deed of assignment and orders of court, and conveyances made in pursuance thereof, such an assignment, under the statute of the State of Illinois regulating assignments by insolvent debtors, left no title, legal or equitable, in the insolvent Consolidated Company which was the subject of conveyance. Being an Illinois corporation, assigning under the laws of the State of Illinois, the effect of the assignment has, of course, to be determined by the decisions of the highest court of that state.

In *Weber* v. *Mick*, 131 Ill., 520, 533, 534, the court said that the

> "assignment is an absolute appropriation of the property to the payment of the debts," passing both legal and equitable title to the property "absolutely beyond the control of the assignor. . . . "Such assignments have always been understood to be instruments voluntarily executed by a failing debtor by which he assigns to some third person, as assignee or trustee, the whole, or sometimes the bulk, of his prop-

erty, to be by such trustee distributed among the assignor's creditors, in satisfaction of their demands."

In Burrill on Assignments, 10, it is said:

"An assignment is likewise an absolute conveyance by which both legal and equitable estate is divested out of the grantor, but the title vested in the assignee is subject to the uses and trusts in favor of the creditors, and upon their satisfaction a trust results in favor of the assignor in the residue of the unappropriated property or its proceeds."

This court, in passing upon the effect of an assignment of an insolvent debtor under the Illinois law, in *Spindle* v. *Shreve*, 111 U. S., 545, said:

"The Court of Appeals of Kentucky, in *Knefler* v. *Shreve*, 78 Kentucky, 297, had before it the very question as to the construction of this deed, and decided that all the estate and interests in property, which, at its date, the grantor held, which he could alien, and which was liable at law or in equity for the payment of his debts, passed by its terms: and in that decision we concur."

In *Walker* v. *Ross*, 150 Ill., 56, the court said:

"These cases further hold that there must be an absolute transfer of the whole interest of the assignor, legal and equitable, in the property assigned in trust for the benefit of creditors."

In *Stoddard* v. *Gilbert*, 163 Ill., 131, 135, there was an attempt to convey property while it was yet in the hands of the assignee, and it was held that the agreement could only become operative upon the discontinuance of the proceedings.

By these decisions it is established that there was no property right of any nature or description whatsoever remaining in Consolidated Ice Machine Company on April 16th, 1891, that could be made the subject of conveyance or transfer by that company. As has been said, all prop-

erty rights of the insolvent corporation had vested in its assignee. Any other decision would be monstrous, as it would enable shareholders to protect their interests without paying their creditors.

It thus appears that the only property or property right that the parties of the first and second part to the contract of April 16th, 1891, could convey were their individual shares in the capital stock of the corporation; and certainly their ownership of these shares is the only right possessed by them and which they could convey, which would justify an action by them against the petitioner or its president. This seems to make it unnecessary to consider the argument that was addressed to the Circuit Court of Appeals, and which seems to have impressed one of the judges, that the transfer of the stock was only incidental to the contract, and therefore the defense of *ultra vires* could not wholly avoid it. In adopting this proposition the learned judge overlooked a distinction which he had himself previously drawn in the case of the *Illinois Trust & Savings Bank* v. *Arkansas City*, 40 U. S. App., 257, 274, where he said:

> "It is that when a part of a divisible contract is *ultra vires*, but neither *malum in se* nor *malum prohibitum*, the remainder may be enforced, unless it appears from a consideration of the whole contract that it would not have been made independently of the part which is void. *Oregon Steam Navigation Company* v. *Winsor*, 20 Wall., 64, 70; *Reagan* v. *Farmers' Loan and Trust Company*, 154 U. S., 362; 395; *Western Union Telegraph Co.* v. *Burlington & Southwestern Ry. Co.*, 11 Fed. Rep., 1, 4, and cases cited in note at page 12; *Saginaw Gas-Light Co.* v. *City of Saginaw*, 28 Fed. Rep., 529, 540."

In the case at bar the transfer of the stock was a part of the consideration. The contract was indivisible in this respect, and the only attempted performance was that of a

partial delivery of the stock. There was no attempt to deliver anything else. The promise to issue a like amount of stock of the De La Vergne Company, or, at the option of Mr. John C. De La Vergne, to pay $100,000 in money —an option which he never exercised—was only to become binding upon the delivery of $100,000 of the stock of the insolvent company, and was a promise to the shareholders as such. The delivery and payment were to be made to the individual shareholders, in proportion to their respective holdings. It was not, therefore, using the language of the learned court in the former opinion, in which he is sustained by authority, "a divisible contract . . . neither *malum in se* nor *malum prohibitum,*" but it was an indivisible contract, *malum prohibitum* by two express enactments of the laws of the State of New York governing the rights of the De La Vergne Company, as will appear in the discussion of the next proposition.

Mr. Bishop, in his work on Contracts, Section 74, thus states the rule:

> "Where the consideration for an indivisible promise is *in part* something done in violation of law, and in remainder some lawful thing, the promise cannot find support on the lawful part without resting also on the unlawful, and the whole will be void. But if there are two promises, the one founded on the unobjectionable in the consideration and the other on the evil, the former will be sustained and the latter will fail."

This statement of the law does not require argument or elaboration in this court.

The rule is succinctly stated in *Miller* v. *Ammon,* 145 U. S., 421, 426, as follows:

> "The general rule of law is, that a contract made in violation of a statute is void; and when a plaintiff cannot establish his cause of action without relying

upon an illegal contract, he cannot recover," citing cases.

II.

The stock of the Consolidated Ice Machine Company was a part of the consideration for the promise of the De La Vergne Company to pay $100,000 in its own stock or in cash; the contract is ultra vires of the vendee company, and therefore illegal and void.

A corporation has such powers as are given it by its charter, and such implied powers as are necessary to carry out the corporate purpose.

This principle is well settled. In *Thomas* v. *Railroad Co.*, 101 U. S., 71, Mr. Justice Miller, speaking for this court, said:

> "We take the general doctrine to be in this country, though there may be exceptional cases and some authority to the contrary, that the powers of corporations organized under legislative statutes are such, and such only, as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others."

Dartmouth College Case, 4 Wheat., 518, 636.

Perrine v. *Chesapeake, etc., Canal Co.*, 9 How., 172, at 184.

Metropolitan Bank v. *Godfrey*, 23 Ill., 531.

Caldwell v. *City of Alton*, 33 Ill., 417.

1 Morawetz Corporations, Sec. 316.

Taylor on Corporations, Sec. 120.

Bell, C. J., in *Downing* v. *Mt. Washington Road Co.*, 40 N. H., 230, said:

> "Corporations are creatures of the legislature, having no other powers than such as are given to them by their charters, or such as are incidental, or necessary to carry into effect the purposes for which they were established."

It is not, nor can it be, claimed that the charter under which the De La Vergne Compnay assumed to act gave it the power to purchase stock in another corporation.

It needs no argument to show that the purchase of stock in another corporation is not necessary to carry into effect the purposes of incorporation.

It matters not what the general rule may be, as such companies as the De La Vergne are prohibited from using funds to purchase stock in another corporation. Sec. 8, Chapter 40, Laws of 1848, of the State of New York, provides:

> "It shall not be lawful for such company to use any of their funds in the purchase of any stock in any other corporation."

It is established that The De La Vergne Refrigerating Machine Company was organized under this act and the amendments thereto. (R. 280.) The law of New York continued to prohibit investments by one manufacturing company in the stock of another until the enactment of Chapter 564, N. Y. Session Laws of 1890, approved June 7, 1890, and going into effect May 1, 1891. Section 40 of said chapter provides that:

> "Any domestic corporation, transacting business in this state, and also in other states or foreign countries, may invest the funds in the stocks, bonds, or securities of other corporations owning lands in this state or such states, if dividends have been paid on such stocks continuously for three years immediately before such

> loans are made, or if the interest on such bonds or securities is not in default, and such stocks, bonds and securities shall be continuously of a market value 20% greater than the amount loaned or continued thereon; . . . no corporation shall use any of its funds in the purchase of any stock of its own or any other corporation, unless the same shall have been *bona fide* pledged, hypothecated, or transferred to it, by way of security for, or in satisfaction or part satisfaction of, a debt previously contracted in the course of its business, or shall be purchased by it at sales upon judgments, orders, or decrees which shall be obtained for such debts or in the prosecution thereof."

It affirmatively appears in the record, by a full copy of all directors' meetings of the Consolidated Ice Machine Company, as well as by testimony of witnesses, that the Consolidated Ice Machine Company never paid a dividend on its stock during its existence; and there is nothing to dispute the inference arising from the fact that its capital stock was $200,000, of which $100,000 was unpaid, except the sum of $10,000, and that its indebtedness was $550,000, which upon the administration of the assets has left $150,000 wholly unpaid—that $100,000 of the stock of the Consolidated Company never was continuously of a market value twenty per cent. greater than the price which it is alleged Mr. De La Vergne had, at his option, agreed to pay therefor.

The stock of the Consolidated Company was part of the consideration to the De La Vergne Company. This question has been adjudicated by the Circuit Court of Appeals as between these parties. (36 U. S. App., 184, 187.)

That was one of the questions in controversy on the first trial. Whether it was a *legal* consideration was a question not suggested.

In the statement of the case, in the first paragraph of the

opinion, Judge Sanborn says the suit is by the German Savings Institution—

> " for that portion of the purchase price of the assets, good-will, *and capital stock* of the Consolidated Ice Machine Company, a corporation, which the defendants in error promised to pay it," etc.

The court held, as matter of law, that the Consolidated Company stock was part of the consideration, and they say that if the small minority of stock not transferred was of any value,

> " the defendants may undoubtedly show that fact under proper pleadings, and offset the damage they have sustained by the failure to assign it, against the $100,000 they promised to pay for the substantial benefits of this contract."

In the absence of express statutory authority, a corporation cannot purchase stock of another corporation.

Boone on the Law of Corporations, Sec. 107, thus states the law:

> " Without a power specifically granted, or necessarily implied, a corporation cannot become a stockholder in another corporation, and especially where the object is to obtain the control or affect the management of the latter."

In Green's Brice's *Ultra Vires*, p. 91, note *b*, it is said:

> " In the United States a corporation cannot become a stockholder in another corporation unless by power specifically granted by its charter, or necessarily implied in it."

Morawetz on Private Corporations, Secs. 431, 433, says:

> " A corporation has no implied right to purchase shares in another company for the purpose of controlling its management. . . . A corporation cannot, in the absence of express statutory authority, become an incorporator by subscribing for shares in a

new corporation, nor can it do this indirectly through persons acting as its agents or tools."

In *People* v. *Chicago Gas Trust Co.*, 130 Ill., 268, at 284 the court said:

> "It has been held in many cases that in the United States corporations cannot purchase, or hold, or deal in the stocks of other corporations, unless expressly authorized to do so by law, and that one corporation cannot become the owner of any portion of the capital stock of another corporation unless authority to become such is clearly conferred by statute."

The following is taken from the syllabus of the case:

> "The gas trust company mentioned was incorporated under the general law for two purposes, as expressed in the articles of association: First, for the purpose of erecting and operating gas works for the manufacture and sale of gas in Chicago and other places in this state; and second, 'to purchase and hold or sell the capital stock, or purchase, or lease, or operate the property, plant, good-will, rights and franchises of any gas works or gas company or companies, or any electric company or companies, in Chicago or elsewhere, etc.
>
> "The company sought to exercise the powers claimed under the second clause only, and for that purpose bought a majority of the shares of all the stock of all the gas companies in Chicago, being four in number, whereby it might have control of all the gas companies in the city, and thus destroy competition and monopolize the gas business. *Held,* that the corporation so formed was not for a lawful purpose, and that all acts done by it toward the accomplishment of such object were illegal and void."

At various times during the years 1873 and 1874 the Erie Railway Company purchased more than one-half of all capital stock of the Buffalo, New York & Erie Railroad Company, and paid for the same out of its corporate funds. *Held*. that such purchase was not necessary in the exercise

of any of its corporate powers; that is was unauthorized and in violation of the statute, and was consequently *ultra vires.*

Milbank v. *New York, Lake Erie & Western R. R. Co.,* 64 Howard's Practice Reports, 20.

In *Talmage* v. *Pell,* 7 N. Y., 328, it was held that a corporation has no power to purchase the stock of other corporations for the purpose of selling them for profit, or as a means of raising money, except when such stocks have been received in good faith as security for a loan made or a debt due such corporation, or when taken in payment of such loan or debt.

In the case of *The Mechanics' Mutual Savings Bank* v. *Meridan Agency Company,* 24 Conn., 159, it was held that a company organized to do a general insurance agency, commission and brokerage business has no power to subscribe to the stock of a savings bank and building association.

In the case of *The Central Railroad Company* v. *The Pennsylvania Railroad Company,* 31 N. J. Eq., 475, it was held that a corporation cannot, in its own name, nor in the name of individuals, subscribe for stock or be a corporation under the general railroad law.

Kennedy v. *Railroad,* 62 N. H., 537.

Hotel Co. v. *Schram,* 6 Wash., 134.

Franklin Co. v. *Lewiston Inst. for Savings,* 68 Me., 46.

It is thus established by the great weight of authority that an agreement by one corporation to purchase stock in another is *ultra vires.* An *ultra vires* contract is illegal and void.

St. Louis, Vandalia & Terre Haute R. Co. v. *Terre Haute & Indianapolis R. Co.,* 145 U. S., 393.

It is shown by the report of the De La Vergne case, in 36 U. S. App., p. 190, that it was mistakenly considered in the nature of a suit for specific performance. No action can be brought to compel specific perfomance of an *ultra vires* contract, which is illegal and void.

Bank of Michigan v. *Niles,* Walker's Chan. R. (Mich.), 99.

In the case of *The Central Transportation Co.* v. *Pullman Car Co.,* 139 U. S., 24, the plaintiff company had leased and transferred all of its property of every kind to the defendant company, which was engaged in a similar and competitive business. The lessee company undertook to pay all of the debts of the lessor company, and to pay to it annually the sum of $264,000 for a term of ninety-nine years. The suit was for a part of the installment for the last year before suit. The defense of *ultra vires* was interposed and sustained, the court holding that the sale was unauthorized and in excess of the power of the selling company. It was argued for plaintiff, as in this case, that, even if the contract was void, because *ultra vires* and against public policy, yet that, having been fully executed on the part of the plaintiff, and the benefit of it received by the defendant for the period covered by the declaration, the defendant was estopped to set up the invalidity of the contract as a defense to an action to recover the compensation agreed on for that period.

After reviewing the prior decisions upon this branch of the case, the court said (p. 59):

> "The view which this court has taken of the question presented by this branch of the case, and the only view which appears to us consistent with legal principles, is as follows: A contract of a corporation which is *ultra vires* in the proper sense, that is to say, outside the object of its creation as defined in

the law of its organization, and therefore beyond the powers conferred upon it by the Legislature—*is not voidable only but wholly void, and of no legal effect.* The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it. When a corporation is acting within general scope of the powers conferred upon it by the Legislature, the corporation, as well as the persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action, because such requisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation nor the other party to the contract can be estopped, by assenting to it or by acting upon it, to show that it was prohibited by those laws.

"A contract *ultra vires*, being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the Courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as it could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it. In such case, however, *the action is not maintained upon the unlawful contract, nor according to its terms*, but on an implied contract of the defendant to return, or, failing to do that, to make compensation for property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract."

The case at bar is not to recover the value of the stock delivered, but to enforce the unlawful sale of stock against

the corporation prohibited by its charter from making the purchase.

In the case of *California National Bank* v. *Kennedy*, 167 U. S., 362, which reasserts the principles laid down in *Central Transportation Co.* v. *Pullman Car Co.*, the court said:

> "The lease sued on having been executed by the defendant contrary to the express prohibition of the statute, which peremptorily forbade the corporation to transact any business unless to perfect its organization, and thus denied it the capacity to enter into any contract whatever, except in perfecting its organization, *the lease is void*, and cannot be made good by estoppel, and will not support an action to recover anything beyond the value of what the defendant has actually received and enjoyed."

In *Marble Company* v. *Harvey*, 92 Tenn., 116, the Marble Company, an Ohio corporation, contracted with Harvey to take shares in a Tennessee corporation doing a like business; the consideration was $6,000, the defendant assuming and agreeing to stand one-half the loss accruing to plaintiff in consequence of suits pending against the Tennessee corporation. The relief sought was to compel defendant to pay one-half the loss accruing. The defense of *ultra vires* was set up. It was held that "the suit is clearly in furtherance of the original, unlawful and void contract. That the contract has been executed by the plaintiff does not make it lawful or entitle it to an enforcement of it." It is in no sense a suit in disaffirmance.

This Tennessee case is so conclusive in its argument, and so exactly parallel in its facts to the case at bar, that any short citation does not enable the court to appreciate its importance in the present discussion. It shows that the contract in this case was executory, and that, to enable the respondents to recover, it is necessary for the court to

give effect to a corporate act which is absolutely forbidden by the express terms of statutes regulating the powers of both the vendor and vendee companies.

It is urged by the respondents in this case, as in the *Central Transportation Co.* v. *Pullman Car Co.*, that, even if the contract was void, because *ultra vires* and against public policy, yet that, having been fully executed on the part of the respondents, and the benefit of it received by the petitioner, the petitioner was estopped to set up the invalidity of the contract as a defense to an action to recover the consideration agreed on.

This court, however, in the Central Transportation Co. case would not allow that defense to prevail, holding the contract *ultra vires* and void, and therefore no performance on either side could give the contract any validity, or be the foundation of any action upon it.

In *California Nat'l Bank* v. *Kennedy*, 167 U. S., 362, the bank became a stockholder in a savings bank, and while such stockholder received dividends on the stock. Both banks failed, and an attempt was made to charge the bank as a stockholder in the savings bank. By virtue of the federal statutes, under which the bank was organized, it had no power to become a stockholder in another corporation. The Superior Court of California adjudged the national bank to be the holder of shares in the savings bank and responsible to the creditors of the savings bank in proportion to its holdings. An appeal was taken to the Supreme Court of the state, which affirmed the judgment. On a writ of error to this court the judgment was reversed.

The court, speaking by Mr. Justice White, held that

> "a national bank has no power to deal in stocks, and cannot, therefore, acquire the stock of another corporation, except as incidental to its power to lend money on personal security."

> "The purchase by a national bank of the stock of another corporation, not as incidental to the banking business, *being void cannot be ratified, and therefore the bank is not estopped to deny its liabilities, for the debts of such corporation, though it has received dividends on the stock.*"

The court deals with the question of estoppel in the following manner:

> "The claim that the bank, in consequence of the receipt by it of dividends of the stock of the savings bank, is estopped from questioning its ownership and consequent liability, is but a reiteration of the contention that the acquiring of stock by the bank under the circumstances disclosed was not void, but merely voidable. It would be a contradiction in terms to assert that there was a total want of power by any act to assume the liability, and yet to say that by a particular act the liability resulted. The transaction, being absolutely void, could not be confirmed or ratified."

and ends the opinion by quoting from the language of Mr. Chief Justice Fuller in *Union Pacific Ry. Co.* v. *Chicago, M. & St. P. Ry. Co.*, 163 U. S., 564:

> "A contract made by a corporation beyond the scope of its powers, express or implied, on a proper construction of its charter, cannot be enforced or rendered enforceable, by the application of the doctrine of estoppel."

This, we submit, is a conclusive answer to respondents' contention.

Granting, for the sake of argument, that the contract was entirely executed on the part of the Consolidated Company and that the De La Vergne Company got everything it bargained for (which we deny), it is not estopped from setting up the defense of *ultra vires*.

The agreement to purchase stock in the Consolidated Company was illegal and void. It was an agreement which

the De La Vergne Company was not only not authorized to make, but was prohibited from making. This action was originally brought to enforce the payment of the purchase price, and is clearly in furtherance of the original, void contract, as these respondents could only owe for the stock or its value. It is in no sense an action in disaffirmance. A court of law will not aid in enforcing a contract which one of the parties had no authority to make, and which was illegal and void.

The only course the respondents could have pursued was to disaffirm the contract and sue the petitioner on the implied contract to return; or, failing to do that, to make compensation for property which it had no right to retain.

The record clearly shows that the petitioner received nothing which it could retain; there is not a scintilla of testimony in conflict with that statement.

John C. De La Vergne and the Consolidated Company and stockholders thereof knew, at the time the contract was made, that the De La Vergne Company had not the power to enter into the agreement by which they attempted to bind it. If they did not know of this want of power, they must be taken to have known it.

> "A contract made by a corporation beyond the scope of its powers, express or implied, on a proper construction of its charter, cannot be enforced, or rendered enforceable, by the application of the doctrine of estoppel."

This, we submit, is a conclusive answer to the plaintiff's contention.

In *McCormick* v. *Market National Bank*, 162 Ill., 100, 109, the court said:

> "Nor is the company, because it represented itself as fully authorized to make this lease, now estopped from insisting upon its want of power. On the con-

trary, it is its duty to cease to act in defiance of the law, and it has no right by silence to suffer itself to be driven into a continuance of what was always wrong."

This case was affirmed by this court in

Mc Cormick v. *Market National Bank*, 165 U. S., 538.

See, also,

Hamor v. *Taylor-Rice Engineering Co.*, 84 F. R., 392, 397.

Durkee v. *People*, 53 Ill. App., 396, 405, 406.

Same case, Supreme Court, 155 Ill., 354.

In the latter case the court said:

"A contract in conflict with constitutional provisions and the statute under which a corporation is organized cannot be ratified or made valid by subsequent acts, and that there is no estoppel against showing that the contract is invalid as in violation of the statute or against public policy."

In *Relfe* v. *Rundle*, *supra*, Mr. Chief Justice Waite said:

"Every corporation necessarily carries with it its charter wherever it goes, for that is the law of its existence. It may be restricted in the use of some of its powers while doing business away from its corporate home, but every person who deals with it everywhere is bound to take notice of the provisions which have been made in its charter for the management and control of its affairs both in life and after dissolution."

And it is to be remembered that the case at bar is not merely the want of power through silence of the legislature, but one where the act done was positively prohibited.

It must be remembered that prior to the signing of the contract of April 16, 1891, the Legislature of the State of New York had enacted the law approved June 7, 1890, quoted *supra*, but which did not go into effect until May

1, 1891, fifteen days after this contract had been signed. It is to be remembered, also, that the law was in effect prior to the execution of the contract by either party.

Being thus prohibited by the statute, even if we should refer alone to the Act of 1890, and executory, the case is within the well-known principle that a legal impossibility occasioned by the passage of a statute rendering the act illegal will, by the courts of this country, in furtherance of the local public policy, be a sufficient excuse for non-performance.

Bailey v. *DeCrespigney*, L. R. 4 Q. B., 180.
2 Schouler on Personal Property, 287.
Benjamin on Sales, 571.
Campbell on Sales, 315.
Newby v. *Sharp*, L. R. 8 Ch. Div., 39.

This proposition is saved by the assignments of error numbered 7 (R. 429) and 22 (R. 432), referring to the fifth proposition of law (R. 431).

It thus appears that we have not here the simple case of want of power because we are unable to put our finger upon a legislative act authorizing the purchase of the stock, but we have a case where, by two acts of the legislatures of the state to which the corporation owes its existence, the particular act which the court is asked to enforce was prohibited.

The contract to increase the capital stock of the De La Vergne Company is ultra vires and void.

Section 3 of the articles of incorporation of the De La Vergne Company is as follows:

> "The capital stock of said Company shall be three hundred fifty thousand dollars, which shall be divided into thirty-five hundred shares of one hundred dollars each."

Where the charter has definitely fixed the capital at a

certain sum, a corporation has no implied authority to alter the amount of its capital stock. Unless expressly authorized, a corporation can neither increase nor diminish the number or value of its shares.

1 Morawetz on Corporations, Sec. 434.

N. Y. & New Haven R. R. Co. v. *Schuyler*, 34 N. Y., 30, is a case in which the right of a corporation to increase its capital by increasing the number of its shares is discussed. We quote from the opinion of the learned court:

> "A corporation, with a fixed capital, divided into a fixed number of shares, can have no powers of its own volition, or by any act of its officers or agents, to enlarge its capital or increase the number of shares into which it is divided. The supreme legislative power of the state can alone confer that authority, and remove or consent to the removal of restrictions which are part of the fundamental law of the corporate being; and hence, every attempt of the corporation to exert such power, before it is conferred by any direct and express action of its officers, is void."

In *Railway Co.* v. *Allerton*, 18 Wall., 235, Justice Bradley said:

> "A corporation, like a partnership, is an association of natural persons who contribute a joint capital for a common purpose; and although the shares may be assigned to new individuals in perpetual succession, yet the number of shares and amount of capital cannot be increased, except in the manner expresssly authorized by the charter or articles of association. . . . Changes in the purpose and object of an association, or in the extent of its constituency or membership, involving the amount of its capital stock, are necessarily fundamental in their character, and cannot, on general principles, be made without express or implied consent of its members."

Scovill v. *Thayer*, 105 U. S., 143, is to the same effect,

and cites with approval both the Schuyler and Allerton cases.

No consent, express or implied, to increase the capital to effect this purchase was ever given by the shareholders of the De La Vergne Company.

The contention has been made that there was no agreement to increase the capital stock. In view of the fact that the contract recited that the then capital stock was $350,000 and the stock must be increased to $2,000,000 or a new corporation formed to comply with the contract, it is not thought that this suggestion needs any attention.

III.

The petitioner was entitled in the court below to a special finding upon the issue of ultra vires raised by its sixth, seventh and eighth pleas (R. 22-24), and the court having refused to find upon this issue, the judgment is void.

It is thought that this principle is too well established to need argument. The court was silent upon many issues raised by the pleadings, and concerning which evidence was adduced, and notwithstanding the fact that he was requested to find specially upon each and every one of these issues. These refusals of the court to find upon the facts thus in issue, and concerning which testimony was adduced, were properly preserved and assigned for error in the Circuit Court of Appeals. They are not discussed at length here, as it is supposed that the principle applying to the one question upon which the judges of the Circuit Court of Appeals divided would apply to all of the other issues in the case concerning which there has been no finding. Upon the question of *ultra vires*, inasmuch as there

was no finding by the trial court, and an equal division of opinion in the Court of Appeals, it appears there has been no trial whatever, and such an extraordinary situation was presented as to require the exercise of the jurisdiction of this court, and was, as we assume, one of the reasons why this court granted the writ of *certiorari*. This would make necessary the reversal of the court below in any event. We have, however, reserved the discussion of this and the following points with the hope that this court would not feel called upon to award a new trial, but finding the contract of such a nature as not to be capable of enforcement against the De La Vergne Company, would order the reversal, with directions to enter a judgment against the respondents and in favor of that company. The want of power being evident, the act attempted (we will say for the sake of argument, though the record shows that it was never authorized by the stockholders or directors of the De La Vergne Company) being prohibited by the laws of its charter state, such direction would seem to be the necessary result of a reversal, and such a course would save the expense of another trial and writs of error to the trial court.

And this leads to the discussion of the invalidity of the judgment against the De La Vergne estate, as represented by the public administrator—the question involved in our next proposition.

IV.

The De La Vergne Company and John C. De La Vergne having incurred a liability (if any) growing out of the same transaction, William C. Richardson, the public administrator of John C. De La Vergne, who has died, cannot be joined with the De La Vergne Company, and the action of the court below in allowing such public administrator to represent the estate of John C. De La Vergne in said action, and rendering a judgment against said De La Vergne, so represented, and this defendant, was not authorized under Sec. 956, R. S. of the United States, and to give such effect to the appointment of the public administrator by the state court is in violation of the provisions of the fifth and fourteenth amendments to the Constitution of the United States.

The record shows that Mr. John C. De La Vergne died testate, on the 12th day of May, 1896. He was a citizen of the State of New York, and his executors proceeded to administer the estate in the City and State of New York. (R. 36-37.) They were not notified or summoned in any way, by *scire facias* or otherwise, to make them parties to this litigation, and counsel stated upon the record (R. 63) that they were not authorized to represent the executors, and that their appearance was to be limited to an appearance for the De La Vergne Refrigerating Machine Company. (R. 58.) In this state of affairs, instead of discontinuing the action as against John C. De La Vergne, as is contemplated by Section 956, R. S. of the United States,

and proceeding against the company alone, it was assumed by the plaintiffs below (respondents here) that they could have the public administrator of the City of St. Louis substituted as a defendant and representative of John C. De La Vergne, and he was so substituted by order of the court below. To this action the appellant, De La Vergne Company, objected, and moved to have the action dismissed as to said administrator, supporting the motion by an affidavit giving the above facts, and also stating that the said John C. De La Vergne had no estate at the time of his death, of any kind or description whatsoever, in the State of Missouri, which could come to the hands of the said administrator, as such. These facts were not disputed. The court overruled the motion to dismiss the action as to De La Vergne through his representative, Richardson; to which an exception was preserved. (R. 37.)

Over like objections, and to the same end, the court admitted in evidence the bond of Richardson as public administrator, and a notice which he had published as such public administrator to the effect that he had taken charge of the estate of John C. De La Vergne. (R. 55, 59.) This notice shows that this administrator was an officer of the same court of which one of the respondents was at the time judge. (R. 55.)

To the same end, the defendants below (petitioners here) objected on the ground that it was not competent to thus appoint a representative of a deceased defendant, and that as such defendant Richardson had no status as a party to the case, and that if such a proceeding were authorized by any statute of the State of Missouri, such statute would be unconstitutional. This action of the court constitutes the third and fourth assignments of error in this court. (R. 465.)

On the part of petitioners it is contended that it is not

competent for a state, either through its legislature or its courts, upon the death of a defendant in the federal court, or for that matter in a state court, although the latter is a moot question here, to authorize a citizen of such state, whether a public official or otherwise, to appear and represent the deceased person, and proceed to a judgment which binds his personal estate in any other court of the United States, under the constitutional provision that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state;" and the general rule with reference to the conclusiveness of judgments recovered in other jurisdictions.

Section 956 of the Revised Statutes of the United States is as follows:

> "If there are two or more plaintiffs or defendants in a suit where the cause of action survives to the surviving plaintiff or against the surviving defendant, and one or more of them dies, the writ or action shall not be thereby abated; but, such death being suggested upon the record, the action shall proceed at the suit of the surviving plaintiff against the surviving defendant."

On a reasonable and proper construction of this section of the statute, we submit it was error to join the public administrator as a party defendant to this action.

The circumstances of this case exactly fit the statute. There were two defendants, the De La Vergne Company and John C. De La Vergne. No argument is necessary to show that the action survives against the surviving defendant. John C. De La Vergne has died. The statute says, "the writ or action shall not be thereby abated," but that, the death of John C. De La Vergne being suggested, the action shall proceed against the surviving defendant, the De La Vergne Company.

This statute says nothing about joining the representa-

tive of the deceased party, but distinctly says that the action shall proceed against the *surviving* defendant.

But aside from the statutory provision governing the case, and considering the question in view of the defendant's liability, we are forced to the same conclusion.

In *Seaman* v. *Slater,* 18 F. R., 485, it is held that:

> "Where several persons have incurred a liability arising from the same transaction, *the representative of one of them who has died cannot, in an action at law, be joined with the survivors.* If the liability is merely joint, the survivors only remain liable at law; if several, as well as joint, the action, if prosecuted against both the representatives of the deceased person and the survivor, must proceed against them separately."

Judge Wallace, in stating the opinion of the court, gives the reason for this rule in the following language:

> "Whether the deceased defendant was a partner or a tenant in common with the surviving defendant, the action cannot be revived against the representatives of the defendant so as to proceed against them and the survivor jointly, because there cannot be a judgment against one *de bonis testatoris* and against the other *de bonis propriis.*"

No matter what view is taken of the liability of the defendants, whether joint, or joint and several, the representatives of the deceased cannot be joined with the survivor in the same action.

In *Ballance* v. *Samuel,* 3 Scam., 380, it is held that:

> "Where one of the joint makers of a contract dies, his executor or administrator is discharged at law; and an action can be maintained only against the survivor."

In *Eggleston* v. *Buck,* 31 Ill., 254, it is held that:

> "Where a contract is several, or joint and several, the administrator of a deceased obligor may be sued

at law in a separate action. But the administrator cannot, in such case, be sued jointly with the survivor. And should they be thus improperly sued jointly, the misjoinder would be had on error."

In *Eich* v. *Severs*, 73 Ill., 194, it is held that:

"In a suit upon a promissory note, against several makers, where the principal dies and his death is suggested, it is improper to make his administrator a co-defendant with the others."

To the same effect are:

Moore v. *Rogers*, 19 Ill., 346.

Powell v. *Kettelle*, 1 Gil., 491.

Conover v. *Hill*, 76 Ill., 342.

The clearest and most emphatic statement of the law on this point is to be found in 1 Chitty on Pleading, 50, and is as follows:

"In the case of a joint contract, if one of the parties die, his executor or administrator is *at law* discharged from liability, and the survivor alone can be sued; and if the executor be sued, he may either plead the survivorship in bar, or give it in evidence under the general issue: but in equity the executor of the deceased party is liable, unless in some instances of a surety. If the contract were several, or joint and several, the executor of the deceased may be sued at law in a separate action; but he cannot be sued jointly with the survivor, because one is to be charged *de bonis testatoris*, and the other *de bonis propriis*."

But aside from these considerations, which show that the same judgment should not be entered against the petitioner and the estate of Mr. John C. De La Vergne, there is a consideration growing out of the provisions of the constitution of the United States, as found in the fifth and fourteenth amendments. Such action on the part of the legislature or of a court is an action depriving persons in-

terested in De La Vergne's estate of life, liberty or property, without due process of law. It is true that this action is by a federal court, and thus within the letter of the prohibition of the fifth amendment, and within the fourteenth also, if the action of the court below rests upon a statute of the State of Missouri or the appointment by the state court.

In *Chicago, Burlington & Quincy R. R. Co.* v. *City of Chicago*, 166 U. S., 226, 233, the court said, speaking of the fourteenth amendment:

> "But it must be observed that the prohibitions of the amendment refer to all the instrumentalities of the State, to its legislative, executive and judicial authorities; and therefore whoever, by virtue of public position under a State government, deprives another of any right protected by that amendment against deprivation by the State, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or, as we have often said, the constitutional prohibition has no meaning, and the State has clothed one of its agents with the power to annul or evade it." (Citing authorities.)
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> . . . . . .

The court holding:

> "That the prohibitions of the Fourteenth Amendment extended to all acts of the State, whether through its legislative, its executive, or its judicial authorities; and consequently it was held that a judgment of the highest court of a State, by which a purchaser at an administration sale, under an order of a probate court, of land belonging to a living person who had not been notified of the proceedings, deprived him of his property without due process of law contrary to the Fourteenth Amendment."

The court below assumed that the action of the probate court in appointing the public administrator, and the

notice of the public administrator that he had entered upon the discharge of his duties and taken possession of the estate of John C. De La Vergne, was conclusive proof that John C. De La Vergne died in the State of Missouri, had an estate there to be administered, and that assets had come to the hands of the public administrator, and that these questions were not controvertible ones. (R. 347, 348.) This was giving to the action of the state court an effect which brings it within the prohibitions of the amendment refered to; and as we have shown, under any proper construction of Section 956 of the Revised Statutes, such a judgment as was entered in this case is erroneous and void.

It may be said that this is not available error in behalf of the De La Vergne Company, petitioner. To this we answer, that if, as is contended, the contract upon which a liability is sought to be enforced was entered into by John C. De La Vergne without any authority whatever from the stockholders or directors of the De La Vergne Company, and there can be no dispute that such was the fact, there would unquestionably be a liability on the part of De La Vergne in his lifetime, and his estate after his death, to the De La Vergne Company, for any injury resulting therefrom. The De La Vergne Company is thus vitally interested in having a judgment, if any can be recovered in such form that it has validity against De La Vergne's estate.

The action of the court in holding that the appointment of the administrator, and his notice that he had entered upon the discharge of the administration of the estate of John C. De La Vergne, deceased, precluded any proof that John C. De La Vergne was a citizen and resident of the State of New York, died in the City of New York, testate, and that his executors there were administering his estate,

and that he left no property in the State of Missouri, is in direct conflict with the principles announced in the decision of this court in *Insurance Co.* v. *Lewis*, 97 U. S., 682. The court there holds that such evidence as was offered in the case at bar and excluded by the court is not a collateral attack upon the appointment or authority of the public administrator. It was there held, as it was here contended in behalf of the appellants, that:

> "Recognizing his right to perform all the functions which, by the laws of Missouri, pertain to that office, the company, in view of the facts we have stated, simply denies that Lewis had any authority, under the statutes of that State or by virtue of his appointment as such administrator, to take charge of the particular estate in question, or assert any claim arising out of the alleged contract of insurance. If the mere presumption by Lewis of authority to that extent was sufficient *prima facie* to maintain this action—a proposition which it is unnecessary to discuss—the conceded and established facts show an entire absence of any such authority, and prove that the company was not bound to litigate with him, in any court whatever, its liability upon the policy sued on. The company only sought to restrict him to the discharge of his legitimate duties, and prevent him from intermeddling in matters which did not concern him as public administrator.
>
> . . . . . .
>
> "The defense, if true, did not question his capacity as such administrator to perform any of the duties imposed upon him by law."

The inference, also, from the case of *New England Mutual Life Ins. Co.* v. *Woodworth*, 111 U. S., 138, holding:

> "Letters of administration which state that the intestate had, at the time of death, personal property in the state, are sufficient evidence of the authority of the administrator to sue in that state, *in the absence of proof that there was no such property.*"

In the case at bar the petitioners offered to show by William C. Richardson, the public administrator, "that no property of any kind or description belonging to John C. De La Vergne'e estate, had come into his possession or control; and that the only property of John C. De La Vergne, deceased, within the State of Missouri, at the time of his death," or at the time of the trial, were certain certificates of stock in the name of and belonging to John C. De La Vergne, deposited by him with Adolphus Busch, a resident of the City of St. Louis and State of Missouri, to indemnify him as surety upon the bond given to release the attachments made at the time these actions were commenced. (R. 428.) This offer was excluded, the court holding that the appointment could not be collaterally attacked and that the presumption of appointment and possession of property was not a rebuttable one.

It is submitted that the authorities last cited are conclusive that this action of the court was erroneous.

It may be said that the presence of certificates of stock in The De La Vergne Refrigerating Machine Company, belonging to John C. De La Vergne in his lifetime and to his estate upon his death, subject to the terms of the deposit with Mr. Busch, established the fact that the deceased had property in the State of Missouri upon which the public administrator was authorized to administer, and which justified his appearance in this case in person and by separate attorney, and his practical consent to a judgment in favor of one of the plaintiffs in the case, who was, as has been said, at the same time a judge of the court in which he was public administrator, performing statutory duties, we will assume, so as to avoid criticism.

This contention, however, has been conclusively answered by the Supreme Court of Missouri in the case of *Armour Bros Banking Co.* v. *St. Louis National Bank,*

113 Mo., 12, where the court, repeating the language in *Foster* v. *Potter,* 37 Mo., 526, held:

> " The property interest of the shareholder is an intangible and indivisible thing and cannot be actually seized by the officer. . . . such property is neither a specific chattel nor a debt, but a mere chose in action."

The court, in the latter case, continuing:

> " But be that right what it may, certificates of stock are not the stock itself—they are but evidences of the stock; and the stock itself cannot be attached by a levy of attachment on the certificate. As was well said by the Supreme Court of Pennsylvania, 'Stock cannot be attached by attaching the certificate any more than lands situated in another state can be attached by an attachment in Pennsylvania served on the title deeds to such lands.' Cook on Corporations, sec. 485. 'Shares of stock in a corporation are personal property whose location is in that state where the corporation is created. . . . Considered as property separated from its owner, stock is in existence only in the state of the corporation.' Cook on Corporations, sec. 485.
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> " In *Young* v. *Iron Co.,* 2 S. W. Rep., 202, the supreme court of Tennessee said: 'If the presence within the state of the stock certificates was essential in determining the *situs* of the stock, then it is admitted that the certificates were, both in contemplation of law as well as in fact, with the person of Powell, who was a non-resident. But these stock certificates were the mere evidences of the ownership of the shares—*indicia* of his interest in the earnings and profits of the company. Their seizure by an execution or by an attachment would not be a seizure or levy upon the stock itself without more. Notice to the corporation, or to the officer having charge of the books of the company, is essential in case of execution. . . . . Hence the locality of the paper certificates, or their actual seizure, is unimportant."

This covers the assignments of error numbered 1, 3, 4, 4½ and 9. (R. 413, 427, 428, 429.)

V.

The respondents abandoned the contract upon which the action is brought and violated its provisions.

The trust agreement by which the creditors, including four of the respondents, appointed Messrs. Knight & Butz their trustees and agents (R. 62), with full power to form another corporation to take over the assets of the insolvent corporation and continue the manufacture of ice machinery (R. 63), is wholly inconsistent with the assertion of liability on the part of the petitioners, and shows an acquiescence in the refusal to go on, embodied in Mr. Fitch's letter of September 12, 1891. They had not delivered the stock; the Attorney General had attacked their corporate existence owing to the very contract upon which these actions are founded (R. 122, 125), and on the ground that the corporation had never been legally organized (R. 127); they had incurred indebtedness to the extent of $450,000 beyond their capital stock, as in effect they now claim they had only $100,000 capital stock and were liable as directors for this excess under the Illinois statute; and they were alleged to be liable as partners because of this defective organization. It was desirable to secure exemption from these liabilities. The creditors were the ones to grant such exemption. The petitioners had not succeeded in purchasing any claims and had received nothing. The respondent's interests lay in another direction—$450,000 as against $100,000—hence they joined the scheme to buy the creditors' claims under an agreement by which they both secured exemption and contemplated going on with the business. The covenant not to do so was not obligatory upon them, as the other party

had released them prior to this date by disaffirming the contract.

It is not important whether the parties did form a corporation or not. Such a contract evinces the intention as clearly as if it had been followed by corporate organization.

But, in fact, the parties did carry on the business from January 30, 1892, until May 10, 1892, as is shown by the conditional sale contract between Knight and Butz, trustees, and John Featherstone's Sons (R. 82), and the testimony of Mr. Thomas (R. 105-108), supplemented as it is by that of Koenigsberg. (R. 259.)

This constitutes abandonment, as is submitted, not as to the four respondents only, but as to all of them, as it affirmatively appears that Judge Rassieur had full powers.

It is submitted that these considerations sustain the proposition that the court erred in finding that none of the respondents had violated the terms or provisions of the contract by which they bound themselves not to enter in or become connected with the sale of refrigerating or ice-making machines, which finding is covered by the fifth and sixth assignments of error. (R. 428-429.)

VI.

The contract was joint and not several, and therefore the actions are improperly brought.

It has been held in Missouri, following the common-law rule, that the non-joinder of all joint promisees is fatal to the plaintiff's case at any time because there is no cause for action in any one promisee.

Rainey v. *Snizer*, 28 Mo., 310.

And in the courts of the United States it is recognized

as an elementary principle of the common law, that when a contract is jointly, payable to several, a defendant can take advantage of the non-joinder of all the obligees by demurrer or in arrest of judgment under the general issue.

The principle of the common law, though technical, cannot be disregarded by the federal courts without the aid of a statute.

Farni v. *Tesson,* 1 Black, 309.

The plaintiff clearly proceeds on the supposition that the covenant to issue the stock is a separate covenant with each stockholder. This supposition is erroneous for the following reasons: The fundamental principle in regard to the construction of contracts as joint or several is that the language of the contract must govern.

Farni v. *Tesson, supra.*

Keightley v. *Watson,* 3 Ex., 716.

Parsons on Contracts, 8th Ed., pages 14 to 17, Williston's Notes.

In this contract there are two covenants to issue this stock. The covenant sued on in this case, in paragraph 4, states that the said parties of the third and fourth parts agree to issue and deliver to said parties of the second part, in the proportions aforementioned, the stock of the said party of the third part to the amount of $100,000. The proportions aforementioned are contained in the second paragraph. In that paragraph the said parties of the third and fourth part covenant and agree to and with the said parties of the first and second parts to issue unto the said parties of the second part $100,000 par value of stock in certain proportions. It is clear that the covenant contained in the second paragraph is a covenant with the parties of the first and second parts as joint covenantees,

although each of the stockholders has a separate interest in the amount of stock to be delivered to him. Under the authorities just given, the separate interest of each stockholder cannot make this joint covenant a separate covenant. This covenant in the second paragraph, although not the covenant sued upon, may, nevertheless, be considered in connection with the covenant in the fourth paragraph to determine the construction of the latter covenant, because the fourth paragraph refers to the second. It is true that in the fourth paragraph, where the parties of the third and fourth part agree to issue and deliver stock to the parties of the second part, no covenantee is named, so that this paragraph, standing alone, might perhaps be looked at as showing a separate covenant with each stockholder. But the second paragraph expressly states that the said parties of the second part covenant to and with said parties of the third and fourth parts to accept in lieu of the said stock the sum of $100,000 in cash. This covenant is clearly joint. Moreover, all the covenants made by the parties of the second part are clearly joint in form. The presumption, of course, is that any promise made to two or more is made to them jointly. The only thing to oppose that presumption in this case is the existence of separate interests in the stockholders; and the language of the whole agreement seems to strengthen, rather than to overthrow, the presumption.

The rule of law applicable is thus stated in 17 Am. & Eng. Enc. of Law, 562:

> "Where . . . there are a number of obligees in a joint contract, the cause of action arising therefrom is joint, and all the obligees must unite as plaintiffs, although some of the said obligees have no interest in the amount recovered, and although some

of them never executed and refuse to execute the contract."

Parsons on Contracts (6th Ed.), star page 13:

"If a contract, which is expressly and in its very terms joint and several, be made with divers persons, but for the payment of a sum, or the accruing of some other benefit, to one of them only, all must join in a suit upon that contract, because but one thing is to be done, and all have a legal interest in the performance of that thing, although but one party has a beneficial interest. . . ."

In *Foley* v. *Addenbrooke,* 3 Gale & Davidson, 64, the court said:

"We are of the opinion that the demise being joint and the covenants upon which the action is brought entire, and made with both the lessors, the cause of action is joint, and that both the covenantees ought to sue, though as between themselves their interests may be separate."

In *Lucas* v. *Beale,* 20 Law Jour. (N. S.), C. P. 134, 4 E. L. & E., 358, the plaintiff, acting on behalf of the members of an orchestra to which he himself belonged, signed a proposal "on behalf of the members of the orchestra" to continue their services, provided the defendant would guarantee certain salary due them. The defendant accepted this proposition, but failed to pay the salary due. The plaintiff alone brought an action for the whole money due to himself and the others, and stated the contract to be with himself and the others. The jury found that he acted on behalf of himself as well as the others. It was held that the contract was joint and that he could not recover.

Lockhart v. *Barnard,* 14 M. & W., 674, was an action of assumpsit. A hand-bill relating to a stolen parcel offered a reward to "whoever should give such information as should lead to the early apprehension of the guilty par-

ties." The information was communicated first by plaintiff to C. in conversation, afterwards to a constable by plaintiff and C. jointly. Held, that C. ought to have joined in the action for the reward.

In *Byrne* v. *Fitzhugh*, 5 Tyr., 54; 1 C. M. & R., 613, before Patterson, J., and Gurney, B., the agreement of defendant was that in consideration of plaintiff and B. using their endeavors to charter ships and procure passengers on board of them, and not engage with any other emigrant broker, they, the defendants, undertook to pay plaintiff and B. a commission of five per cent. on the amount of the net passage money made by the ships, one-half to be paid the plaintiff and the other half to B. *Lane* v. *Drinkwater* being cited, it was held that plaintiff, suing without B., should be non-suited.

In *Hatsall* v. *Griffith*, 4 Tyr., 487, a broker was employed to sell a ship belonging to three part owners, two of whom communicated with him. To them he paid their shares of the proceeds of the sale; but, after admitting the third part owner's share to be in his hands, refused to pay it to him without the consent of the other two. An action of assumpsit having been brought by the third part owner for the share, *held* that he was not entitled to recover.

In *Petrie* v. *Bury*, 3 B. & C., 353, Covenant, Demurrer, the covenant declared upon was with the plaintiff and two others, for the use of a third party. The declaration averred that the two other covenantees had never sealed the deed. It was held, notwithstanding, that all *might* sue, so all *must* sue, and that the declaration was bad.

In *Southcote* v. *Hoare*, 3 Taunt., 87, action upon a covenant upon an indenture of three parts. It was held, on demurrer, that a covenant with A. and B. and with

every of them is joint, though A. is a party of the first part, and B. party of the second part, to the deed.

In *Guidon* v. *Robson*, 2 Camp., 302, there was an action by the drawer and payee of a bill of exchange against the acceptor. The bill sued upon was drawn payable to Guidon & Hughes, under which firm the plaintiff traded. There was no one associated with him as a partner; but he had a clerk named Hughes, and Lord Ellenborough held that such clerk should have been joined.

The conclusion asserted by the proposition we are now discussing is made certainly necessary if we regard the transactions as a sale of the assets of the Consolidated Ice Machine Company, or the consideration as proceeding from that company.

If we regard it as a sale of separate shares of stock, and this were a suit in equity for specific performance, as the Circuit Court of Appeals was led to suppose, there would be much reason for construing the contract so as to give to each party plaintiff in these cases a separate cause of action.

While it is noticeable that neither of the defendants ever agreed to pay $100,000 in lieu of the stock to be delivered, but John C. De La Vergne alone reserved the option to do so, and there is not a syllable of proof that the De La Vergne Company's stock was worth par or any price, yet the covenant to deliver and the covenant as to value (upon which the action is not founded) are covenants clearly joint in their character. As this is an action at law brought severally upon a joint covenant, it should fail.

The court was asked to declare the contract a joint one (R. 431, VII), and its refusal so to declare the law is the assignment of error numbered 24. (R. 432.)

It is insisted that the judgment of the Circuit Court was not authorized either by the facts as originally agreed upon between the parties, or as disclosed by the record upon the second trial; that the court erroneously felt itself limited by the expressions of the Circuit Court of Appeals when the cause was first before that court, and erred in all respects as is assigned upon the record; and that the Circuit Court of Appeals should have reversed said court with directions to find for the defendants, and that this court should now so act.

Respectfully submitted,

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